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“KIDDIE CRIME”? THE UTILITY OF CRIMINAL LAW IN CONTROLLING CYBERBULLYING

SUSAN W. BRENNER* & MEGAN REHBERG**

INTRODUCTION

*It is a scary thought that someone could go to jail for posting a comment on the Internet. If so, we could not build jails fast enough.*¹

Cyberbullying is a growing problem in the United States and elsewhere. It presents schools with what is at once an old and a new problem: Much of cyberbullying consists of activity that has been common in schools for decades, probably for centuries (e.g., spreading gossip and rumors, or harassing other students). What is unique about cyberbullying is that students can use cyberspace to broadcast gossip and rumors to a much wider audience and take harassment to new levels.

Since cyberbullying—unlike its antecedent—is not confined to school premises, some suggest it is a phenomenon the law needs to address. Some, in fact, go so far as to suggest that criminal law should be used to deter cyberbullying. That is the issue we address in this article. In Part I, we define cyberbullying, which provides the empirical foundation for the analysis in subsequent sections. In Part II, we examine the viability, and permissibility, of using established criminal law to control cyberbullying. In Part III, we con-

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1. *State v. Ellison*, 900 N.E.2d 228, 231 (Ohio Ct. App. 2008) (Painter, J., concurring); *See infra* Part II.A.2.b for an examination of the *Ellison* decision.

sider whether new criminal law can, or should, be used to control the residual category of cyberbullying activity that cannot be addressed under existing criminal law.

Before we proceed, we should explain why our title includes the phrase “kiddie crime.” In using the phrase, we by no means intend to minimize the “harm” caused by cyberbullying or the problems it creates for educational institutions. We use it as a term of art—a collective noun encompassing the varieties of cyberbullying that are not considered criminal under existing law. We examine these issues in Parts II and III.

I. CYBERBULLYING: A DEFINITION AND A TAXONOMY

Cyberbullying has garnered a variety of definitions as it has gained notoriety. Since the definitions in common use tend to be imprecise, our first task is to define the phenomenon we intend to analyze. The primary problem we see with many of the current de facto definitions is that they do not differentiate between bullying in an educational context and bullying in a general societal context.² It is necessary to distinguish adult-on-adult bullying from what has traditionally been considered bullying, i.e., student-on-student aggression that occurs in an educational context.³ This is essential because much of what constitutes adult bullying—and certainly the more serious types of adult bullying—can be addressed with existing criminal law.⁴

For our purposes, therefore, we use a definition of cyberbullying that encompasses only that conduct which occurs in an educational context. We define cyberbullying as the repeated use of computer or other modern communications technology to engage

2. See, e.g., Kim Zetter, *Man Receives Compensation for Cyberbullying*, WIRED, Dec. 22, 2008, <http://www.wired.com/threatlevel/2008/12/british-man-rec/> (reporting a bullying incident in a societal context).

3. See generally PETER RANDALL, BULLYING IN ADULTHOOD 7-31 (2001) (providing an overview of adult bullying); BULLYING IN AMERICAN SCHOOLS: A SOCIAL-ECOLOGICAL PERSPECTIVE ON PREVENTION AND INTERVENTION 1-5 (Dorothy L. Espelage & Susan M. Swearer eds., 2004) (providing a social-ecological framework of bullying among children).

4. See discussion *infra* Part III.

in non-physical abuse of one or more individuals when the actors are all constituents of a common educational context. Two parts of this definition are significant. The first is the requirement that the contact be repeated; the second is that the conduct takes place within an educational context.

What do we mean by “educational context”? Does it only encompass students who have not yet attained a high school diploma? Or should it also encompass college, university, graduate, and even trade-school students? We could exclude the latter categories because of the premise noted earlier: that cyberbullying should be distinguished from simple adult-on-adult aggression. But while there are important empirical differences between K-12 students and adults who attend post-secondary educational institutions, every educational context can generate the dynamics that give rise to bullying and cyberbullying.⁵ We therefore do not limit the educational context element of our definition to the K-12 sector; our definition encompasses cyberbullying in any educational institution, regardless of the age of those who attend. Our limitation of the education sector, however, distinguishes our definition from others that require, for example, only “willful and repeated harm.”⁶ Our definition allows us to consider the possibility that traditional criminal law—which is generally adequate to deal with generic adult-on-adult cyberbullying—may not be adequate when the cyberbullying involves adults who are also students.

Simply defining cyberbullying is not enough. While our definition captures the distinctive elements of cyberbullying, it also assumes a unitary phenomenon. That is, like all definitions, it assumes that cyberbullying involves a single dynamic: bully and victim. That assumption is a common feature of substantive criminal law. Murder, for example, involves the reciprocal roles of murderer and victim, robbery involves the reciprocal roles of robber and victim, and so on. It also involves a power imbalance: in traditional

5. See, e.g., Darby Dickerson, *Cyberbullies on Campus*, 37 U. TOL. L. REV. 51, 63-66 (2005) (addressing cyberbullying in higher education and in law schools).

6. SAMEER HINDUJA & JUSTIN W. PATCHIN, *BULLYING BEYOND THE SCHOOLYARD* 5 (2009).

crimes, the perpetrator has some advantage—greater strength, a weapon, information that can be used to blackmail someone—that gives him the ability to harm the victim.

Real-world bullying and cyberbullying also involve a power imbalance between bully and victim,⁷ but the imbalance is more nuanced because cyberbullying, unlike its real-world counterpart, is predicated upon the infliction of non-physical harm. The reliance on non-physical harm alters the power imbalance between bully and victim because the participants in an educational institution have different roles (teacher and student), and these roles usually determine the respective power positions of the participants in a given cyberbullying dynamic. When a cyberbully targets another student, the power imbalance between the two is likely to be indistinguishable from the imbalance between a real-world bully and his hapless victim; but when a cyberbully targets a teacher, the power imbalance is likely to be less uneven given the teacher's position in the educational institution.

Differences in the power imbalance in the cyberbullying dynamic are an important factor in assessing the propriety of using criminal law to deal with cyberbullying. We therefore developed a taxonomy of cyberbullying that captures the nuanced power imbalances that can occur in this phenomenon: student-on-student cyberbullying; student-on-teacher cyberbullying; teacher-on-student cyberbullying; and teacher-on-teacher cyberbullying. We examine each category below.

A. Taxonomy

This section reviews instances of cyberbullying that fall into each of the categories in our taxonomy. Part I.B addresses another relevant distinction: private versus public cyberbullying. We will return to the issues addressed in these sections in Part III, when we assess the utility and propriety of using criminal law to deal with the problem of cyberbullying.

7. See KEN RIGBY, *NEW PERSPECTIVES ON BULLYING* 32 (2002).

1.Student-on-Student

There are two high-profile examples of student-on-student cyberbullying. One case involved eight teens in Florida who physically assaulted another student and videotaped the incident, posting it on YouTube. The students apparently wanted to gain notoriety and fame from the video, which became popular enough to obtain the attention of *The New York Times*.⁸ The beating, which went on for about a half hour, left the victim with a concussion and two black eyes, and the video went viral on the Internet. The police believed that the beating was the result of comments that the victim, Victoria Lindsay, had been posting on MySpace.⁹ This case is an interesting hybrid between cyberbullying, where the harassment takes place online, and traditional bullying, where the harm from the bully is physical in nature.

Another interesting cyberbullying case from New York involved a middle school blogger who dubbed herself "Miss In the Know" (also known as Miss ITK) and blogged about her classmates on the Upper East Side of Manhattan.¹⁰ The student's blog was based heavily on the premise of the popular television show "Gossip Girl," in which an unknown resident of the Upper East Side blogs about wealthy high school students. The blog's writing style was sharp enough to merit comments from *New York Magazine's* Daily Intel blog¹¹ and *The New York Sun*, but students and parents were less than thrilled.

One post read: "He fell so fast, even seventh graders won't hook up with him. Now that's GOTTA hurt. Dear Tommy, rip up those tickets to the top, because you're headed on a one-way trip to the B-list. Love, ITK."¹² When school officials received complaints

8. Damien Cave, *Eight Teenagers Charged in Internet Beatings Have Their Day on the Web*, N.Y. TIMES, Apr. 12, 2008, at A11.

9. *Id.*

10. Elizabeth Green, *Tears, Glee Greet a 'Gossip Girl' Copycat*, NEW YORK SUN, May 22, 2008, <http://www.nysun.com/new-york/tears-glee-greet-a-gossip-girl-copycat/76895/>.

11. Daily Intel Blog, http://nymag.com/daily/intel/2008/05/real_life_gossip_girl_roils_th.html#hp (May 22, 2008, 12:00 EST).

12. Green, *supra* note 10.

about the blog, it was shut down, although there were no reports of how this occurred. It was so beloved by some students that a group commemorating it was created on Facebook.¹³

In this case, while the activity falls under the repeated context we require in our definition, it is worthwhile to note that this blog was not targeting one particular student but was critical of many. As a result, under some definitions this could *not* be construed to be cyberbullying because it lacks the necessary repeated attacks on one particular subject. This case is noteworthy, however, because of its connection to popular culture.

We noticed a general absence of examples of student-on-student cyberbullying—primarily, we think, because students (and their parents) are reluctant to pursue litigation, and so the incidents are handled privately, either by schools, parents, or students themselves. Student-on-student cyberbullying also has a large contingent of examples that fall into the “private” category, so many cases simply do not move beyond the bully and the victim. Student-on-teacher cyberbullying cases are, however, not as difficult to come by.

2.Student-on-Teacher

Student-on-teacher cyberbullying can occur in many ways. In a Pennsylvania case, for example, a student created a website from his home on which he posted derogatory and threatening comments and drawings about his principal and his math teacher.¹⁴ The website was entitled “Teacher Sux” and contained a number of pages, including one that discussed, in vulgar terms, a fabricated sexual relationship between the principal and a principal at another school, as well as a page attacking the student’s math teacher, Mrs. Fulmer, entitled “Why Fulmer Should be Fired.”¹⁵ The most nota-

13. R.I.P – In the Know 2012, <http://www.facebook.com/group.php?gid=18673786321> (last visited Nov. 5, 2009).

14. *J.S. v. Bethlehem Area School District*, 807 A.2d 847, 848 (Pa. 2002).

15. *Id.* at 851. The “Why Fulmer Should be Fired” page argued, using “degrading terms, that because of her physique and her disposition, Mrs. Fulmer should be terminated from her employment. . . . Finally, along with

ble page, however, was titled "Why Should She Die?" and requested funds from the reader to hire a hit man.¹⁶ This was followed by 136 repetitions of defamatory language, and a picture of a decapitated Mrs. Fulmer with blood dripping from her neck.¹⁷ On the first page of the website, the student also included a disclaimer that stated that "by clicking," the visitor agreed that he would not tell any employees of the school district about the site, that the visitor was not a member of the staff, and that the visitor would not disclose the identity of the site's creator.¹⁸

Eventually, the principal discovered the existence of the site and, believing the threats to be serious, called the police and the Federal Bureau of Investigation. Both authorities declined to file charges. The teacher was informed of the site and also took the threats seriously, and was granted medical leave for a full school year due to her inability to return to teaching.¹⁹ The student was eventually given a three-day suspension, which was extended to ten days, with the school ultimately opting to expel the student.²⁰ The student and his parents sued, claiming that this was a violation of the student's free-speech rights.²¹ The court ultimately held that schools can restrict off-campus online speech that threatens a person's safety when they can demonstrate harm to the victim, and that, in this case, the website "created an actual and substantial interference with the work of the school."²² This case is a prime ex-

the criticism of Mrs. Fulmer, a web page provided answers for certain math lessons." *Id.*

16. *Id.* The "Why Should She Die?" page asked readers to "'Take a look at the diagram and the reasons I gave, then give me \$20 to help pay for the hitman.'" *Id.* The diagram "consisted of a photograph of Mrs. Fulmer with . . . physical attributes highlighted to attract the viewers' attention. . . . Another page set forth a diminutive drawing of Mrs. Fulmer with her head cut off and blood dripping from her neck." *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 852 (the teacher developed anxiety and depression; as a result, she could not return to work for the remainder of the school year and was granted a medical leave the following year).

20. *Id.* at 852-53.

21. *Id.* at 853.

22. *Id.* at 869.

ample of cyberbullying being properly handled by the school. While the police and the FBI were called, neither decided that charges were appropriate in this situation, and they left the district to deal with reprimanding the student.

In another student-created website case, Justin Layshock created a false MySpace page of his high school principal, Eric Trosch.²³ This fake profile ridiculed Trosch's weight and sexuality, mentioned steroids and alcohol, and contained a photograph of Trosch copied from the school's website.²⁴ Justin created the false profile at his grandmother's home, during non-school hours.²⁵ This page was online for approximately six days before Layshock tried to remove it himself.²⁶ Layshock received a ten day out-of-school suspension, but the court ruled that his First Amendment rights were violated because there was no material and substantial disruption, and that while the profile may have been lewd, it was not obscene and the conduct occurred off school property.²⁷

Similarly, in *A.B. v. State*,²⁸ a student's writing on a MySpace page purported to be her principal's was considered protected political speech.²⁹ A.B., knowing the profile was false and had not been made by her principal, made six derogatory and obscene postings, including "die . . . gobert . . . die."³⁰ The State of Indiana filed charges and A.B. was adjudicated to be delinquent. She was placed on probation for nine months. The Supreme Court of Indiana ultimately ruled that there was insufficient evidence to support A.B.'s harassment conviction.³¹

In another MySpace case, Alex Davis, a fifteen-year-old student, posted a comment on a MySpace page of his teacher,

23. *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 591 (W.D. Pa. 2007).

24. *Id.*

25. *Id.*

26. *Id.* at 591-92.

27. *Id.* at 601, 603.

28. 863 N.E.2d 1212 (Ind. Ct. App. 2007) *rev'd on other grounds*, 885 N.E.2d 1223 (2008).

29. *Id.* at 1218.

30. *Id.* at 1214.

31. *A.B. v. State*, 885 N.E.2d 1223, 1228 (Ind. 2008).

Robert Muzzillo. The profile mentioned an appreciation of Michael Jackson and liking to have a "gay old time."³² Davis claimed he only wrote that Muzzillo lost an eye while wrestling with alligators and midgets.³³ The teacher was so offended that he filed defamation charges against Davis.³⁴ The Georgia court dismissed them as unconstitutional.³⁵

In a Connecticut case, a high school student was barred from running in a senior class election after she criticized administrators on her blog for their handling of a student music festival.³⁶ Avery Doninger blamed "douchebags in central office" for the purported cancellation and asked students to complain to the school superintendent.³⁷ In response to the blog, the school prohibited Doninger from running for class secretary in her senior year. Doninger filed suit, claiming that her First Amendment rights had been violated.³⁸

The court held that the prohibition of Doninger from running from office was proper, because her posting "foreseeably created a risk of substantial disruption within the school environment."³⁹ The court held that the language used in her blog was plainly offensive, potentially disruptive, misleading, or potentially false, and that her behavior could have affected the governing of the student council as a result.⁴⁰

32. *Student Charged for Making Fun of Teacher*, WSBTV.COM, May 16, 2006, <http://www.wsbtv.com/news/9219518/detail.html>.

33. *Id.*

34. *Id.*

35. Ken Rodriguez, *Lewd Web Posting about Principal Leads to Lawsuit, School Options*, EXPRESS-NEWS (San Antonio), Sept. 21, 2006, http://www.mysanantonio.com/news/MYSA092206_03A_Rodriguez_2eb29de_html3637.html.

36. Alex Johnson, *Rules to Curb Online Bullying Raise Concerns*, MSNBC.COM, Jan. 23, 2009, <http://www.msnbc.msn.com/id/28629118/>.

37. *Id.*

38. *Id.*

39. *Doninger v. Niehoff*, 527 F.3d 41, 53 (2d Cir. 2008).

40. *Id.* at 50-52.

In *J.S. v. Blue Mountain School District*,⁴¹ two eighth grade students created a MySpace page of their principal, Mr. McGonigle. The page did not identify the principal by name, but did identify him as a principal and included a picture taken from the school website.⁴² The MySpace page depicted the principal as a pedophile and a sex addict whose interests included “hitting on students and their parents.”⁴³ The school determined that the students violated the discipline code, which prohibits false accusations against staff members, and that the students also violated the computer use policy when they took a copyrighted picture from the school website.⁴⁴ The students received ten-day out-of-school suspensions.⁴⁵

J.S. sued the school district, claiming a violation of First Amendment rights and arguing that the school could not punish her for out-of-school speech that did not cause a substantial disruption.⁴⁶ The judge disagreed, however, holding that the school could discipline for lewd and vulgar off-campus speech that had an effect on campus.⁴⁷

In an interesting turn of events, a vice-principal in Texas sued the students who created a false MySpace page, as well as their parents, alleging negligent supervision. The vice-principal’s lawyer described the page as “four pages of filth” that “rose to a level which was so unbelievably vile, the only thing we could do is what we did.”⁴⁸ The website included her picture, pulled from the school website, her place of employment, lewd comments suggesting she was a lesbian, and images of sexual devices.⁴⁹ Vice-Principal Anna Draker sued Benjamin Schreiber and Ryan Todd for defamation and libel per se, and their parents for negligence and gross negligence relating to the parents’ supervision of their children’s use of

41. No. 3:07CV585, 2008 U.S. Dist. LEXIS 72685 (M.D. Pa. Sept. 11, 2008).

42. *Id.* at *2.

43. *Id.*

44. *Id.*

45. *Id.* at *6.

46. *Id.* at *7.

47. *Id.* at *17-18.

48. Rodriguez, *supra* note 35.

49. Draker v. Schreiber, 271 S.W.3d 318, 320 (Tex. App. 2008).

the Internet.⁵⁰ The court granted the students' motion for summary judgment and dismissed Draker's claims against the students for defamation and libel per se.⁵¹ Her claim for intentional infliction of emotional distress was also dismissed in summary judgment, and the court found that the claims against the parents were dependent upon liability findings against the minors, resulting in a dismissal of all claims.⁵²

In *Requa v. Kent School District No. 415*,⁵³ a student covertly recorded a teacher in class and posted the video on YouTube, and several students linked the video to their MySpace pages. Requa was allegedly not the student who videotaped the teacher, but was named by another student as someone who was involved with the project.⁵⁴ The video criticized the hygiene of teacher Joyce Mong and poked fun at her weight and the clutter in her classroom.⁵⁵ The video was titled "Mongzilla" and called it a "Mongtage" of images. The video never surfaced at school, nor did anyone at school become aware of the video until a local news station started searching the Internet for students who had created YouTube videos criticizing their high school teachers.⁵⁶

The court found that the video, which also included a student making "rabbit ears" and pelvic thrusts behind the teacher, constituted a material and substantial disruption when it denied the plaintiff's motion to enjoin the school district from enforcing a forty-day suspension.⁵⁷

50. *Id.* at 321.

51. *Id.*

52. *Id.* at 324.

53. 492 F. Supp. 2d 1272 (W.D. Wash. 2007).

54. Paul Shukovsky & Nina Akhmeteli, *Free Speech vs. Class Disruption*, SEATTLE POST-INTELLIGENCER, May 22, 2007, http://www.seattlepi.com/local/316618_youtube22.html.

55. *Id.*

56. *Requa*, 492 F. Supp. 2d at 1274.

57. *Id.* at 1280.

3. Teacher-on-Student

It is, perhaps understandably, difficult to find reported instances in which a teacher cyberbullied one or more of his students. One example of this type of cyberbullying involves the Charlotte-Mecklenburg Schools in Charlotte, North Carolina. Seven teachers had social networking pages that were inappropriate. The superintendent has recommended firing a teacher who wrote that her activities included “teaching chitlins in the ghetto of Charlotte” and “drinking.”⁵⁸ Another teacher used a Facebook “mood box” to post “I’m feeling p—ed because I hate my students!”⁵⁹

While there are currently few, if any, cases that fall into this category of our taxonomy, we included it for two reasons. First, it is a logical alternative. Second, we believe this type of cyberbullying will become more common as teachers increasingly use online resources such as MySpace and Facebook to communicate with their students. As perhaps we all know, online communication can generate a sense of intimacy that can induce adults, as well as children, to engage in inappropriate behavior.

4. Teacher-on-Teacher

Cases involving conduct that was treated as teacher-on-teacher cyberbullying are rare, probably for two reasons. First, cyberbullying is generally less common among adults than it is among children. Second, when teacher-on-teacher cyberbullying occurs, it is treated either as a situation involving employment law or as a matter for criminal prosecution. The latter alternative is likely to occur when the cyberbullying teacher’s conduct rises to the level of stalking, harassment, or defamation.⁶⁰ There is, though, a Pennsylvania episode known as the “drunken pirate” case.

58. *North Carolina Teachers Face Consequences for Facebook Posts About Students*, NATIONAL SCHOOL BOARDS ASSOCIATION, Nov. 12, 2008, <http://www.nsba.org/MainMenu/SchoolLaw/Issues/Employment/News/TeacherFacebookPosts.aspx>.

59. *Id.*

60. *See infra* Part II.

Stacy Snyder was a student teacher at a local school who was repeatedly reprimanded by her cooperating teacher for unprofessional behavior, including discussing how a run-in with her ex-husband while at dinner with her boyfriend ruined her Valentine's Day.⁶¹ Snyder had been warned during orientation not to refer to their students or cooperating teacher on social networking or personal web pages, but she chose to ignore the warning and posted a critical remark about her cooperating teacher.⁶² She also posted a picture entitled “drunken pirate” on an area of the website her students could view. The picture depicted her wearing a pirate hat and holding a plastic cup.⁶³ As a result of this picture, she was not allowed to complete her student teaching placement, which resulted in her graduating with a Bachelor of Arts in English instead of her expected Bachelor of Science in Education degree.⁶⁴

B. A Final Distinction: Public vs. Private Cyberbullying

In addition to the distinctions included in our taxonomy, there are also differences in how cyberbullying is performed. It can be “public” or “private.”

We define public cyberbullying as involving any material that is posted in a public forum: YouTube, MySpace, Facebook, Twitter, blogs, or websites. This material can range from embarrassing pictures that the subject would rather not see posted, to harassing quotes posted to a Facebook wall, to the cyberbully's own social networking page. Also included in this definition would be any instances of “private” cyberbullying spread to a large number of people—e.g., a text sent to a large number of people, forwarding a private e-mail to a group of friends, or posting a status message on an instant messenger client such as Trillian or AOL Instant Messenger.

61. *Snyder v. Millersville Univ.*, No. 07-1660, 2008 U.S. Dist. LEXIS 97943, at *12 (E.D. Pa. 2008).

62. *Id.* at *13.

63. *Id.* at *15.

64. *Id.*

A prime example of “public” cyberbullying is the rise of “sexting,” the act of sending sexually charged material via cell phone text messages.⁶⁵ While raising a host of child pornography issues, resulting in felonies for possession and dissemination of child pornography in eleven states, sexting itself is not cyberbullying, as it does not fit within our definition. The act moves into the realm of cyberbullying when the “sexts” are sent to those other than the intended recipients.⁶⁶

In a tragic example, Jesse Logan, an eighteen-year-old from Cincinnati, Ohio, committed suicide after a nude picture she sent to her boyfriend was forwarded to other classmates at her school.⁶⁷ The cyberbullying then crossed into more traditional forms of bullying as the classmates harassed her, calling her derogatory names and ultimately making attending school so traumatic that she began skipping school and ultimately hung herself in her closet.⁶⁸

Private cyberbullying, on the other hand, tends to be between the cyberbully and the target. E-mails, instant messages, and private messages on social networking sites all fall into this category. This type of cyberbullying can cause just as much emotional harm as public cyberbullying, as seen in the Megan Meier case from Missouri.⁶⁹ While we will not discuss the case in detail here since much information can be found elsewhere, the Meier case involved private cyberbullying carried out via MySpace and AOL Instant Messenger. That case ended just as tragically as the Logan case mentioned above—Meier committed suicide in her closet after re-

65. Mike Celezic, *Her Teen Committed Suicide Over ‘Sexting,’* MSNBC.COM, Mar. 6, 2009, <http://www.msnbc.msn.com/id/29546030/>.

66. Dahlia Lithwick, *Textual Misconduct: What to do About Teens and Their Dumb Naked Photos of Themselves*, SLATE, Feb. 14, 2009, <http://www.slate.com/id/2211169/>.

67. See Celezic, *supra* note 65.

68. *Id.*

69. Steve Pokin, *‘My Space’ Hoax Ends with Suicide of Dardenne Prairie Teen*, SUBURBAN JOURNALS (St. Louis), Nov. 11, 2007, http://suburbanjournals.stltoday.com/articles/2007/11/11/news/sj2tn20071110-1111stc_pokin_1.i11.txt.

ceiving a private message that stated, “The world would be a better place without you.”⁷⁰

In the next section we examine the existing offenses that *could* be applied to prosecute cyberbullies. In Part III, we consider whether we need to create a new crime—a “kiddie crime”—to address the residual conduct that cannot be prosecuted under current law.

II. CRIMINAL LAW AND CYBERBULLYING

*“Cyberbullying should be a crime”*⁷¹

As noted earlier, the frustration of dealing with cyberbullying has led some educators to call for the use of criminal sanctions against those who engage in such activity.⁷² In this section, we analyze the extent to which existing criminal offenses apply to cyberbullying; the sections below each examine an offense or offenses that might apply to cyberbullying.⁷³ Each section is divided into two parts: The first outlines the elements of a particular offense (or, in one instance, related offenses); the second analyzes the applicability of the offense(s) to cyberbullying.

A. *Stalking and harassment*

Since most states do not have criminal cyberbullying laws,⁷⁴ prosecutors who want to impose criminal liability on cyberbullies

70. *Id.*

71. Meagan Fitzpatrick, *Cyberbullying Should Be A Crime, Teachers Say*, GAZETTE (Montreal), July 11, 2008, <http://www.canada.com/montrealgazette/news/story.html?id=2b381545-bfd8-4fe8-9fc7-2a63ae3009d3&k=22707>.

72. *See id.* (“Cyberbullying is becoming so prevalent in Canadian schools[that a] teachers’ group says it should be a punishable offence”).

73. Since our concern is with cyberbullying, we do not consider offenses such as assault, rape, arson, murder, which require conduct in the real world. We are concerned only with crimes that can be committed online.

74. *But see* IDAHO CODE ANN. § 18-917A(2) (2004) (criminalizing “student harassment, intimidation or bullying,” which are defined as conduct that is “sufficiently severe, persistent or pervasive that it creates an intimidating, threatening or abusive educational environment for a student”).

often rely on stalking and harassment statutes. In the first section below, we explain how these statutes evolved and the conduct they outlaw. In the next section we analyze their suitability for use against cyberbullies.

1. The Crimes

Harassment is the older of these related crimes. The criminalization of harassment began about a century ago, when it became apparent that telephones could be used for less-than-legitimate reasons. The initial problem occurred when callers used “vulgar, profane, obscene or indecent language.”⁷⁵

Concerned about the “harm” being done to the women and children who received such calls, states responded by adopting statutes that created the crime of “telephone harassment.”⁷⁶ While telephone harassment tended to focus only on obscene or threatening phone calls, some states broadened their harassment statutes to encompass more general conduct, such as “anonymous or repeated telephone calls that are intended to harass or annoy.”⁷⁷ This approach to harassment still survives in the basic harassment statutes of many states.⁷⁸

The basic harassment statutes in effect until the last decade of the twentieth century generally failed to encompass more problematic conduct, such as touching someone, insulting them, or following them.⁷⁹ That began to change in 1989, when actress Rebecca

75. See, e.g., *Darnell v. State*, 161 S.W. 971, 971 (Tex. Crim. App. 1913) (affirming the conviction of a man for using vulgar, obscene, and indecent language over the phone).

76. See *id.*; see also Andrea J. Robinson, Note, *A Remedial Approach to Harassment*, 70 VA. L. REV. 507 (1984) (examining various forms of harassment and subsequent remedies).

77. Robinson, *supra* note 76, at 524 (surveying telephone harassment statutes then in effect).

78. See, e.g., ALA. CODE § 13A-11-8(b)(1)(a) (LexisNexis 2005) (communications that “harass or cause alarm”); CONN. GEN. STAT. § 53a-183(a) (West 2007) (“harass, annoy or alarm” another); IND. CODE § 35-45-2-2(a)(2004) (same); N.Y. PENAL LAW § 240.26 (McKinney 2008) (same).

79. See *supra* note 78. Cf. MODEL PENAL CODE § 250.4(2)-(5) (1980) (encompassing behavior such as offensive touching and taunting).

Schaeffer was stalked and killed by an obsessive fan.⁸⁰ Shocked by the Schaeffer murder and five similar murders, California legislators passed the nation's first criminal stalking law in 1990.⁸¹ By 1993, forty-eight states had followed suit.⁸² In 1999, New York became the final state to adopt a criminal stalking statute.⁸³

Most of the state stalking statutes followed the California model,⁸⁴ which essentially defines stalking as aggravated harassment:

Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.⁸⁵

The California stalking statute has two *actus reus* elements: (i) repeatedly following or otherwise harassing the victim; and (ii) a credible threat to the victim or victim's family. It defines "harass[ment]" as engaging in a "course of conduct directed at a specific

80. See, e.g., Robert A. Guy, Jr., *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 991 (1993) (analyzing the scope and constitutionality of recently created stalking statutes, including the California statute); see also E.A. Torriero, *The Strange Ways of Slaying Suspect*, SAN JOSE MERCURY NEWS (July 21, 1989), 1989 WLNR 814458 (reporting the the arrest and investigation of Schaeffer's stalker).

81. See Guy, *supra* note 80, at 992.

82. See Paul E. Mullen & Michele Pathé, *Stalking*, 29 CRIME & JUST. 273, 275 (2002).

83. See Kimberly Wingteung Seto, *How Should Legislation Deal with Children as the Victims and Perpetrators of Cyberstalking?*, 9 CARDOZO WOMEN'S L.J. 67, 70 (2002).

84. See Guy, *supra* note 80, at 992.

85. CAL. PENAL CODE § 646.9(a) (West 1999). California does not make simple harassment a crime.

person that seriously alarms, annoys, torments, or terrorizes the person and that serves no legitimate purpose.”⁸⁶ The statute defines “credible threat” as a

verbal or written threat, . . . or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family.⁸⁷

California’s focus on “credible threat” as an element of stalking led some to characterize stalking as an inchoate crime, on the premise that the “harm” it addresses is the “murder, rape or battery that the stalking . . . could ultimately produce.”⁸⁸ Others

86. *Id.* § 646.9(e). Like other stalking and harassment statutes, the California statute does not define “legitimate purpose.” A Michigan court relied on the plain meanings of “serve” and “legitimate” to conclude that “the phrase ‘conduct that serves a legitimate purpose’ means conduct that contributes to a valid purpose that would otherwise be within the law irrespective of the criminal stalking statute.” *Cavanaugh v. Smith*, No. 282147, 2009 WL 1101379, at *5 (Mich. App. Apr. 23, 2009) (quoting *Nastal v. Henderson & Assoc. Investigations, Inc.*, 691 N.W.2d 1, 1 (Mich. 2005)). See also *People v. Pidhajecky*, No. 2007NY092014, 2008 WL 2746722, at *4 (N.Y. Crim. Ct. July 16, 2008) (holding that conduct which serves “no legitimate purpose” can include more than just conduct that lacks “ideas other than threats, intimidation, or coercion”); *In re R.T.T.*, 26 S.W.3d 830, 838 (Mo. Ct. App. 2000) (defining conduct that has a “legitimate purpose” as that which is lawful, custom, or allowed).

87. CAL. PENAL CODE § 646.9(g) (West 1999). It is not necessary that the stalker “had the intent to actually carry out the threat.” *Id.* Under the statute, an electronic communication device “includes, but is not limited to, telephones, cellular phones, computers, video recorders, fax machines, or pagers.” *Id.* § 646.9(h).

88. Nick Zimmerman, Comment, *Attempted Stalking: An Attempt-to-Almost-Attempt-to-Act*, 20 N. ILL. U. L. REV. 219, 234 (2000) (“stalking seeks to prevent a certain harm—murder, rape, etc.”).

argued that stalking is not an inchoate crime because its concern is the infliction of a *distinct* "harm." As one law review article noted, the "harm" stalking laws address is "a product of potential future harm. Stalking is wrongful because the threat of future violence causes emotional injury to the victim."⁸⁹

Florida took a slightly different approach by creating two crimes: basic stalking and aggravated stalking.⁹⁰ The basic stalking offense required that the stalker (i) intend to inflict emotional "harm" on the victim and (ii) willfully engage in repeated following or harassment of the victim.⁹¹ The aggravated stalking offense added the requirement that the stalker make a "credible threat" with the intention to cause the victim to fear for his or her safety.⁹² Basic stalking was a misdemeanor, while aggravated stalking was a felony.⁹³

As society became more familiar with the nuances of the conduct involved in and "harm" inflicted by stalking, states began to expand the scope of their statutes. As one author noted, while contemporary stalking statutes still tend to target "credible threats" directed at the victim or victim's family, many also criminalize conduct that would cause a "'reasonable person' to . . . suffer severe emotional distress."⁹⁴ Missouri's statute, for example, states that anyone "who purposely and repeatedly harasses . . . another person commits the crime of stalking," and defines "harasses" as engaging "in a course of conduct directed at a specific person that serves no legitimate purpose, that would cause a reasonable person to suffer substantial emotional distress, and that actually causes substantial emotional distress to that person."⁹⁵

The Missouri statute does not define "emotional distress," but other statutes do. The Michigan stalking statute defines it as

89. Guy, *supra* note 80, at 1010-11.

90. *See id.* at 1004-06.

91. *Id.*

92. *Id.*

93. *Id.*

94. Naomi Harlin Goodno, *Cyberstalking, A New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 MO. L. REV. 125, 134-35 (2007) (citations omitted).

95. MO. ANN. STAT. § 565.225 (West 1999).

“significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.”⁹⁶ The Michigan statute is very similar to the Missouri statute. It defines stalking as “a willful course of conduct involving repeated or continuing harassment . . . that would cause a reasonable person to feel terrorized, frightened, . . . harassed, or molested and that actually causes the victim to feel terrorized, frightened, . . . harassed, or molested.”⁹⁷ It defines “harassment” as “conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress.”⁹⁸

A number of states have similar provisions,⁹⁹ and some courts have noted that stalking statutes are intended to prevent “emotional harm” to victims.¹⁰⁰ And while this is probably not necessary, a few states have included language in their statutes to make it clear that they apply to electronic stalking, or cyberstalking.¹⁰¹

96. MICH. COMP. LAWS ANN. § 750.411h(1)(b) (West 2004).

97. *Id.* § 750.411h(1)(d). *See also id.* § 750.411h(2) (stalking is a crime).

98. *Id.* § 750.411h(1)(c).

99. *See* COLO. REV. STAT. ANN. § 18-9-111(4)(b)(III) (West 2008); D.C. CODE § 22-404(b) (2001); FL. STAT. ANN. § 784.048 (West 2007); IDAHO CODE ANN. § 18-7906(1)(a) (2004); LA. REV. STAT. ANN. § 14:40.2(A) (2007); MONT. CODE ANN. § 45-5-220(1) (2007); OKLA. STAT. ANN. tit. 21, § 1173 (2002); PA. CONS. STAT. ANN. § 2709(a) (2000); TENN. CODE ANN. § 39-17-315 (2006); UTAH CODE ANN. § 76-5-106.5(2) (2008); W. VA. CODE ANN. § 61-2-9a (LexisNexis 2005); WIS. STAT. ANN. § 940.32 (West 2005); WYO. STAT. ANN. § 6-2-506(a) (2009).

100. *See* Snowden v. State, 677 A.2d 33, 38 (Del. 1996); *see also* People v. Furey, 784 N.Y.S.2d 922, 2004 WL 869586, at *2 (N.Y. Crim. Ct. Apr. 6, 2004) (finding that stalking statutes focus on the victim’s state of mind and the fear the stalker is causing the victim).

101. *See, e.g.,* FLA. STAT. ANN. § 784.048(1)(d) (defining the term “cyberstalk”); *see also* R.I. GEN. LAWS § 11-52-4.2(a) (2002) (outlining cyberstalking and cyberharassment as distinct crimes). California does this by defining “credible threat” as a threat communicated verbally, in writing or “through the use of an electronic communication device.” CAL. PENAL CODE § 646.9(g) (West 1999). An electronic communication device “includes, but is not limited to, telephones, cellular phones, computers, video recorders, fax machines, or pagers.” *Id.* § 646.9(h). It is probably not necessary to include language that specifically refers to the use of computer or electronic technology to engage in

Such language is probably not necessary because the essence of the crime of stalking is, as with other crimes, the perpetrator's engaging in activity that he or she knows will inflict certain "harm" upon the victim with the purpose of inflicting such "harm." As long as stalking statutes proscribe the infliction of the prohibited "harm," the means used to inflict it need not be set out in the statute.¹⁰²

While a number of states incorporate harassment into their stalking statutes, either as a way of defining stalking or as a way of defining a lesser-included offense of stalking,¹⁰³ a few have free-standing harassment offenses that make it a crime to inflict emotional distress on a victim. Delaware's harassment statute, for instance, makes it a crime to "harass . . . another person" by insulting, taunting or challenging them or engaging "in any other course of alarming or distressing conduct which serves no legitimate purpose and is in a manner which the person knows is likely to . . . cause a reasonable person to suffer substantial emotional distress."¹⁰⁴

stalking or cyberstalking, because the gravamen of the crime of stalking is inflicting affective harm on the victim; the method used to inflict such harm is therefore irrelevant to the commission of the offense.

102. See, e.g., SUSAN W. BRENNER, *LAW IN AN ERA OF "SMART" TECHNOLOGY* 137-83 (2007) (analyzing how personal relationships with technology can shift depending on methods of use and interaction levels, and how criminal laws should develop to address the problem of technological misuse).

103. See *supra* notes 84 & 90; see also ARK. CODE ANN. § 5-71-229(a)(1) (2005) (incorporating harassment into the stalking statute as a way of defining stalking); COLO. REV. STAT. § 18-9-111 (2009) (proscribing stalking and harassment in the same statute); GA. CODE ANN. § 16-5-90 (2007) (incorporating harassment into the stalking statute as a way of defining stalking); HAW. REV. STAT. §§ 711-1106.4 & 711-11-6.5 (1993) (incorporating harassment as a way of defining a lesser-included offense of stalking); IDAHO CODE ANN. §§ 18-7905 & 18-7906 (same); WASH. REV. CODE ANN. § 9A.46.110 (West 2009) (incorporating harassment into the stalking statute as a way of defining stalking).

104. DEL. CODE ANN. tit. 11, § 1311(a)(1) (2007). See also MASS. GEN. LAWS ANN. ch. 265, § 43A(a) (2002) (treating harassment as a separate offense, and making it a crime to inflict emotional distress on a victim); N.M. STAT. ANN. § 30-3A-2(A) (West 2003) (same).

It has been difficult, and arguably problematic, for criminal law to address the infliction of emotional “harm.”¹⁰⁵ The “emotional distress” stalking and harassment statutes represent a compromise: although they criminalize the infliction of affective “harm,” they do not predicate the imposition of criminal liability purely on self-diagnosed psychic injury.¹⁰⁶ Instead, they incorporate a “reasonable person” standard to ensure that the imposition of liability is based not on the idiosyncrasies of a particular individual, but on conduct that can be deemed to inflict an objectively ascertainable “harm.”¹⁰⁷

There is also a federal stalking statute: 18 U.S.C. § 2261A. Section 2261A(2) makes it a federal crime for

- to “kill, injure, harass, or intimidate, or cause substantial emotional distress” to someone or place the person “in reasonable fear” of death or serious bodily injury to himself, to

105. For a characterization of this affective “harm,” see Lambèr Royakkers, *The Dutch Approach to Stalking Laws*, 3 CAL. CRIM. L. REV. 2, ¶¶ 19-20, 27 (2000).

106. For the premise that affective “harm” is too idiosyncratic to provide a reliable predicate for the imposition of criminal liability, see, for example, Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 442 (2003) (“[U]nlike physical injury, the severity of emotional injury permits few reliable inferences about the act that led to the injury, because victims vary widely on how they respond and express themselves emotionally to the same crime.”).

107. See, e.g., DEL. CODE ANN. tit. 11, § 1311(a) (defining harm as occurring when a “reasonable person [would] suffer fear, alarm, or distress”); IDAHO CODE ANN. § 18-7906 (prohibiting conduct that “would cause a reasonable person substantial emotional distress” or “to be in fear of death or serious injury”). The inclusion of an objective standard also protects these statutes from being held void for vagueness. See, e.g., *People v. Cross*, 114 P.3d 1, 7 (Colo. Ct. App. 2004) (holding that the statute at issue was not overly vague, as it was “sufficiently specific to provide sufficient guidance to individuals seeking to comply with the law and to law enforcement officers enforcing the statute”), *rev'd on other grounds*, 127 P.3d 71 (Colo. 2006); *State v. Partowkia*, No. 39060-1-I, 1999 WL458967 (Wash. App. July 6, 1999) (holding that a stalking statute was not overly broad or vague); see also *State v. Bryan*, 910 P.2d 212, 220-21 (Kan. 1996) (the lack of an objective standard defining stalking terms caused the statute to be found void for vagueness).

a member of his immediate family, or to his spouse or intimate partner;

- to use the mail or the Internet or any other facility of interstate or foreign commerce; or
- to engage in a course of conduct that causes “substantial emotional distress” to the victim or places him “in reasonable fear of the death of, or serious bodily injury” to himself or to any of the persons listed above.¹⁰⁸

The federal statute is therefore both a “credible threat” and an “emotional distress” stalking statute. The credible threat option *might* apply to cyberbullying, but the residual option—the emotional distress option—is more likely to be useful in this context. To convict someone of this offense, the prosecution will have to prove that he or she intended to cause “substantial emotional distress” to the victim(s) and used the mail or the Internet to engage in a course of conduct that caused such distress.¹⁰⁹ The statute does not define “substantial emotional distress.”

2. Use Against Cyberbullying

In analyzing the use of harassment and stalking statutes against cyberbullies, it is useful to divide cyberbullying into two categories: direct cyberbullying and indirect cyberbullying. Each is analyzed below.

The cyberbullying tactics we analyze in this section do not rise to the level of a credible threat; we analyze threats in Part II.D.2, *infra*. Here we are concerned with communications that cause the victim to suffer substantial emotional distress (stalking)

108. 18 U.S.C. § 2261A (2006).

109. The statute also, of course, makes it a crime to use the mail or the Internet to kill, injure, or harass someone, or to make them reasonably fear the death of or serious bodily injury to the persons listed above. *See id.* § 2261A(2). Since cyberbullying rarely rises to the level of threatening death or serious bodily injury, the option outlined in the text above is the most likely to be applicable to cyberbullying.

or “harass or annoy” him or her (harassment). The discussion in the first subsection analyzes the use of harassment or stalking; the discussion in the second subsection focuses primarily on harassment because the more stringent harm requirements of stalking make it difficult to prosecute indirect cyberbullying as stalking. The third subsection provides a general assessment of the potential for using either or both crimes against cyberbullies.

a. Direct Cyberbullying

This category consists of situations in which the bully directs electronic communications directly at the victim. It encompasses a cyberbully’s use of instant messaging, text or multimedia messaging, or e-mail intended to have a direct, immediate effect on the victim.

The communications may be directed specifically at the victim, such as messages that call the victim “fat,” “stupid,” or a “slut.”¹¹⁰ The messages can be more specifically personal. A few years ago, a twelve-year-old girl was bullied by a former friend who bombarded her with instant messages that said things such as “[e]veryone hates you, I hate you, you have no friends.”¹¹¹ Direct cyberbullies also start rumors (e.g., a female engaged in intercourse or oral sex with one or more males) among the victim’s friends or peer group and use altered versions of messages to make it appear the victim said things he or she did not. The actions of direct cyberbullies can aggregate, intentionally or inadvertently. Ryan Halligan, for example, was a Vermont eighth-grader who was the target of an extensive cyberbullying campaign in which one student spread a rumor that he was gay and a popular female student pretended to

110. See, e.g., Amanda Burgess Proctor, Sameer Hinduja & Justin W. Patchin, *Cyberbullying and Online Harassment: Reconceptualizing the Victimization of Adolescent Girls*, in FEMALE CRIME VICTIMS: REALITY RECONSIDERED 162, 168 (V. Garcia & J. Clifford eds., 2009) (victims reported being called “fat,” “ugly,” “slut,” and “bitch,” among other “unpleasant names”).

111. Gretchen Voss, *Mean-Kids.com*, BOSTON MAGAZINE (Jan. 2006), <http://www.bostonmagazine.com/articles/meankidscom/>.

like him, then mocked him by distributing their instant message exchanges to the whole school.¹¹²

Can those who engage in conduct such as this be prosecuted for stalking or harassment? Direct cyberbullying satisfies an essential—albeit implicit—requirement of both offenses: it is directed at a specific victim. Like other crimes against persons, stalking and harassment only encompass conduct that targets a particular individual; this requirement derives both from the plain language of the statutes criminalizing stalking and harassment, and from the fact that both offenses criminalize what is, in effect, an emotional assault.¹¹³

It is therefore at least conceptually possible that stalking and harassment statutes could be used to prosecute those who engage in direct cyberbullying. The critical question is whether the conduct involved in direct cyberbullying can establish the mens rea, actus reus, and harm requirements of stalking or harassment.

Since stalking and harassment are, at least to some extent, evolved inchoate crimes, stalking and harassment statutes consistently require the highest level of mens rea, i.e., that the perpetrator acted intentionally, purposely, or willfully.¹¹⁴ To satisfy this requirement, the prosecution would have to prove beyond a reasonable doubt that the cyberbully engaged in conduct that was directed at the victim and was intended to cause the proscribed harm. For many stalking and harassment statutes, the proscribed harm is substantial emotional distress or emotional distress; for some harassment statutes, it is conduct that "harasses or annoys" the victim. The prosecutor will also have to prove beyond a reasonable doubt that the conduct the bully used was capable of, and did in fact inflict, the proscribed level of harm.

112. See *id.* (bullying eventually led Ryan to commit suicide).

113. See, e.g., NEB. REV. STAT. § 28-311.02(2)(a) (2008) (harassment requires conduct directed at "a specific person"); see also Royakkers, *supra* note 105, at ¶ 20 (defining the different parts of stalking and discussing stalking as a "mental assault").

114. The three terms are, for all practical purposes, synonyms. See, e.g., *State v. Coca*, 341 N.W.2d 606, 610 (Neb. 1983) (stating that "[i]ntentionally means 'willfully' or 'purposely'"). As to specific intent and inchoate crimes, see Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 8 (1989).

Satisfying these requirements is likely to be impossible except in the most egregious cases, or when a prosecution is brought under a harassment statute that requires conduct which merely “harasses” or “annoys” the victim.¹¹⁵ How, for example, is a prosecutor to show—beyond a reasonable doubt—that a cyberbully acted with the *purpose* of causing his or her victim some level of emotional distress? The prosecutor may well be able to show that the victim suffered the requisite level of emotional distress, but we cannot impose criminal liability simply because someone in fact inflicted emotional distress on another person. We all inflict emotional distress on others from time to time, sometimes inadvertently, sometimes intentionally.

Establishing the bully’s intent, and the causal nexus between that intent and the resultant harm to the victim, would be critical in a stalking or harassment prosecution predicated on direct cyberbullying. Many stalking and harassment statutes include an element that is designed to provide the empirical basis for a reasonable inference of such intent: They require that a perpetrator have purposely engaged in a “course of conduct” directed at a victim.¹¹⁶ This incorporates an objective element into the mens rea analysis: a jury can infer the requisite mens rea (purpose or intent) both from the nature of the defendant’s conduct (here, the nature of the communications used to target the victim) and from its persistence.¹¹⁷

115. See GUY, *supra* note 80, at 992.

116. See, e.g., ARIZ. REV. STAT. ANN. § 13-2923(A) (2001 & Supp. 2008) (stating that “[a] person commits stalking if the person intentionally or knowingly engages in a course of conduct that is directed toward another person and [listing additional elements]”); S.D. CODIFIED LAWS § 22-11-32 (2006) (defining course of conduct to mean “a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose”).

117. See, e.g., *Shannon v. Anderson*, 1996 WL 81495, at *2 (Minn. App. 1996) (holding that a defendant’s “entire course of conduct reasonably support an inference of intent”); *Commonwealth v. Spiropoulos*, 1992 WL 494958, at *2 (Pa. C.P 1992) (holding that an isolated incident could not constitute a course of conduct sufficient to support a charge of harassment); see also Goodno, *supra* note 94, at 134-35 (explaining that the course of conduct requirement ensures that only truly egregious behavior is prosecuted).

A prosecutor might, therefore, be able to use a cyberbully's direct engagement in a course of conduct targeting his or her victim to establish that the perpetrator acted with the requisite *mens rea*. That is, a prosecutor could use a bully's persistence in bombarding the victim with harassing or tormenting messages to support the inference that the cyberbully not only knew the effect the messages would have on the victim, but wanted to cause this effect. Conversely, it would be very difficult—probably impossible—for a prosecutor to rely on such an inference in a case in which the bully sent only a single message, however horrific it might have been. Indeed, the alleged bully's transmission of a single message could inferentially rebut prosecutorial claims that the message was intended to inflict emotional distress; the incident lacks the persistence and consequent implicit calculation present whenever a stalker or harasser consistently bombards the victim with offensive or unwanted communications. The alleged bully could argue that the message was the result of a transient fit of temper or pique, not of an intent to cause emotional distress.

In many instances, the age of the alleged bully might have to be factored into the intent to cause emotional distress calculus. When an adult engages in a persistent, focused course of conduct that inferentially demonstrates an intent to inflict some level of emotional distress, it can—depending on the facts at issue—be reasonable to infer that this was the adult's purpose. We attribute a greater level of maturity and an ability to assess the consequences of one's actions to adults. It may, again depending on the facts at issue, be less reasonable to infer such intent when the perpetrator is a juvenile.¹¹⁸

It might be easier for a prosecutor to pursue charges under a harassment statute that makes it a crime to "harass" or "annoy"

118. See generally *A.B. v. State*, 885 N.E.2d 1223, 1227-28 (Ind. 2008) (explaining that the evidence did not support harassment charges against juvenile; instead of an intent to harass, it was "more plausible that A.B., then fourteen years old, merely intended to amuse and gain approval . . . from her friends, and/or to generally vent anger for her personal grievances").

someone, instead of causing emotional distress.¹¹⁹ Some of these statutes also include the possibility of “alarming” the victim; many state the alternatives (e.g., harass, annoy, alarm) severally, which suggests that a prosecution could be predicated on simply “annoying” someone.¹²⁰ That, however, is unconstitutional. In *Coates v. Cincinnati*,¹²¹ the Supreme Court struck down a city ordinance that made it a crime for three or more persons to assemble on a sidewalk and “conduct themselves in a manner annoying to persons passing by.”¹²² The Court held that the statute was void for vagueness because “[c]onduct that annoys some people does not annoy others.”¹²³ Courts have consequently held that harassment statutes that make “annoy” one of several actus reus terms, any of which can be used to hold someone liable for harassment, are void for vagueness.¹²⁴

119. See *supra* note 78. See also ARIZ. REV. STAT. ANN. § 13-2921(E) (stating that harassment means “conduct directed at a specific person which would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person”); S.D. CODIFIED LAWS § 22-19A-4 (2004) (stating that “harasses means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person”).

120. See, e.g., *Coates v. Cincinnati*, 402 U.S. 611, 611 n.1 (1971) (explaining a Cincinnati ordinance that stated:

It shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings. Whoever violates any of the provisions of this section shall be fined not exceeding fifty dollars (\$ 50.00), or be imprisoned not less than one (1) nor more than thirty (30) days or both.

§ 901-L6, CINCINNATI, OHIO, CODE OF ORDINANCES (1956)).

121. 402 U.S. 611 (1971).

122. *Id.* at 611.

123. *Id.* at 614.

124. See, e.g., *Karenev v. State*, 258 S.W.3d 210, 216-17 (Tex. App. 2008) (striking down a harassment statute that made it a crime to send electronic communications that “annoy or alarm” the victim), *rev'd on other grounds*, 281 S.W.3d 428 (Tex. Crim. App. 2009).

It would therefore not be possible to prosecute a direct cyberbully for harassment on the ground that he or she merely "annoyed" the victim. It would probably also not be possible to base such a prosecution on the premise that the direct cyberbully "alarmed" (or "annoyed" and "alarmed") the victim, since some courts have held that predicated criminal liability on mere "alarm" renders a statute void for vagueness.¹²⁵ Generally, courts have upheld harassment statutes when they include some limiting conditions, such as a requirement that the conduct have "no legitimate purpose" or harm requirements that go beyond merely annoying or alarming the victims.¹²⁶ Some have found that a statute's inclusion of a specific intent to harass the victim is also sufficient to prevent its being held void for vagueness.¹²⁷

A prosecutor could probably prosecute a direct cyberbully for harassment if he or she could show that the cyberbully acted with the specific intent to inflict the proscribed harm (e.g., harassment, annoyance, and alarm) and that the conduct at issue had no legitimate purpose.¹²⁸ However, prosecutors may also be able to infer specific intent in this context, since harassment offenses encompass the infliction of a lesser degree of harm than do most stalking statutes. While some harassment statutes allow liability to be predicated upon the transmission of a single harassing message,¹²⁹ it

125. See, e.g., *Karenev* 258 S.W.3d at 214-16.

126. *Commonwealth v. Welch*, 825 N.E.2d 1005, 1018-19 (Mass. 2005).

127. See, e.g., *Galloway v. State*, 781 A.2d 851, 867 (Md. 2001) (finding the statute was not vague because of the reasonable person standard and requirement of specific intent); *People v. Shack*, 658 N.E.2d 706, 712 (N.Y. 1995) ("By including a specific intent element in the statute, the Legislature has removed the possibility that a Defendant could be unaware of his criminal conduct.").

128. The Delaware harassment statute, for example, should provide the constitutional predicate for such a prosecution. See 11 DEL. CODE ANN. tit.11, § 1311(a)(1) (2007) (stating that a person commits harassment when he or she "insults, taunts or challenges another person or engages in any other course of alarming or distressing conduct which serves no legitimate purpose and is in a manner which the person knows is likely to . . . cause a reasonable person to suffer fear, alarm, or distress").

129. See, e.g., ARIZ. REV. STAT. ANN. § 13-2921(A)(1) (2001) (requiring only "a communication" to violate the statute).

might be difficult to obtain a conviction under such a statute when the prosecution was predicated on direct cyberbullying, just as it should be difficult to obtain a conviction for stalking in the same circumstances.

What about situations in which the discrete acts of two or more cyberbullies target the same victim? Since the aggregated harm is likely to be more severe when direct cyberbullies collectively target one victim, it could be easier to infer specific intent in this context if the prosecution could show that the bullies knew of each other and intentionally combined their efforts to inflict greater harm on the victim.¹³⁰ If this is a viable option, it should apply in

130. The conceptual difficulty with doing this could lie in finding a basis for imputing the intent of one direct cyberbully to another or others, and vice versa. There are no reported cases involving charges of conspiring to commit criminal harassment, but if a prosecutor could use a conspiracy charge to link the cyberbullies together, that would provide a basis for imputing each bully's individual intent to the others. *Cf., e.g., United States v. Cabrera*, 284 F. App'x 674, 686 (11th Cir. 2008) (holding that the evidence was sufficient to show both conspiracy and individual intent to commit the substantive FDCA offense charged); *People v. Hardy*, 825 P.2d 781, 816 (Cal. 1992) (holding that the evidence supported the charge of conspiracy to commit murder).

The other, perhaps less viable possibility for using the actions of another cyberbully or other cyberbullies as the basis for inferring that Direct Cyberbully "A" had the specific intent to commit harassment or stalking lies in the law of accomplice liability. An accomplice can be held liable for the conduct of someone whom he "aids . . . or attempts to aid" in the commission of a crime. MODEL PENAL CODE § 2.06. Courts have found that someone qualifies as an accomplice if he or she encouraged the commission of a crime. *See, e.g., Waddington v. Sarausad*, 129 S. Ct. 823, 828 n.1 (2009). *Waddington* quotes a Washington statute that states:

[a] person is an accomplice of another person in the commission of a crime if . . . [w]ith knowledge that it will promote or facilitate the commission of the crime, he . . . (i) solicits, commands, encourages, or requests such other person to commit it; or . . . (ii) aids or agrees to aid such other person in planning or committing it.

Id.

Arguably, then, if two or more direct cyberbullies collaboratively inflict the harm proscribed by a stalking or harassment statute, then each is an accomplice of the other. Courts have found that an accomplice's specific intent to commit a crime can be inferred from his or her collaboration with others who intended to commit that crime. *See United States v. McNeil*, 106 F.

both stalking and harassment cases. If, as seems more likely, each cyberbully acted independently of the others, each would have to be treated as a distinct case with regard to mens rea, actus reus, and resultant harm.

In sum, prosecutions for stalking or harassment are a potential means of addressing cyberbullying, at least in the most egregious cases. The stringent mens rea requirements for both crimes, coupled with the age of the perpetrator(s), will make it difficult, or impossible, to bring such prosecutions when the conduct involved in the bullying was isolated or sporadic and the substance tended to be petty rather than malicious.

b. Indirect Cyberbullying

In indirect cyberbullying, the cyberbully does not direct the electronic communications that constitute the bullying at his or her victim directly. Instead, the bully posts them on MySpace, Facebook, a specially created website or blog, or some other reasonably public area of cyberspace. This aspect of indirect cyberbullying gives rise to two issues, neither of which arises with direct cyberbullying: (1) to what extent did the cyberbully intentionally direct the online communication(s) at the victim; and (2) to what extent did he or she intend the communication(s) to be seen by others whose reactions were likely to have a negative impact on the victim?¹³¹

App'x 294, 299-300 (6th Cir. 2004). The problem with this theory is that accomplice liability applies only when there is a principal, i.e., a person who actually commits the crime. Accomplices by definition play a supporting role in the collaborative commission of a crime. If a collective direct cyberbullying scenario involved one cyberbully who played a leading role by, say, directing the others, then this theory should apply. If, on the other hand, each cyberbully acted independently of the others, it should not.

131. The negative impact can take various forms; for example, loss of actual or potential employment, humiliation, professional discipline, or impairment of relations with the victim's family and friends.

These issues do not arise with direct cyberbullying because the direct cyberbully specifically directs the communications that are the vehicle for the bullying at the victim. As we saw in the previous section, this can take the form of transmitting the communications to the victim (only), transmitting them to members of the victim's peer or family group (only), or transmitting

Two recent cases address these issues. In *State v. Ellison*,¹³² high school student Ripley Ellison was convicted of harassment after she posted a photograph of Savannah Gerhard, a classmate (and former best friend), on her MySpace page with the caption “Molested a little boy.”¹³³ The posting referred to a falling-out the two had when they were in the seventh grade after Ripley’s younger brother accused Savannah of molesting him.¹³⁴ The Department of Job and Family Services (JFS) investigated the allegation, but did not find “enough evidence to substantiate” the boy’s claim.¹³⁵

When Savannah heard about the posting, she read Ripley’s MySpace page. Some time earlier, she had seen a “short remark” Ripley posted “on a contemporary’s MySpace page that also referred to the molestation accusation,” but Savannah said Ripley had never “directly communicated these postings” to her, even though she, too, had a MySpace account.¹³⁶ After she read the caption on the photograph, Savannah complained to authorities at her school, which led to Ripley being charged with, and convicted of, criminal harassment.¹³⁷

At Ripley’s bench trial, Savannah reiterated that Ripley “never directly communicated with her over the Internet and that she had sought out the postings.” Savannah also said she felt “‘harassed’ by the postings” and had overheard Ripley making “a similar remark about her at school.”¹³⁸ Ripley testified that “she believed her brother’s accusations” against Savannah and gave this explanation for posting the offensive material: “I think that other people need to know how she is. And she denies everything, but a lot of people believe that she did it. And I was told that she did it. And so I think that other people have a right to know.”¹³⁹ Ripley was

them to both groups. In each of these alternatives, the focus is on the victim, a focus which is lacking or ambiguous in indirect cyberbullying.

132. 900 N.E.2d 228 (Ohio Ct. App. 2008).

133. *Id.* at 229.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

convicted of one count of telecommunications harassment; she appealed.

The statute Ripley was convicted of violating required that the defendant have "made a telecommunication . . . with [the] purpose to abuse, threaten, or harass another person."¹⁴⁰ Ripley argued first that since she had not directly contacted Savannah, she had not made a telecommunication within the meaning of the statute.¹⁴¹ The Ohio Court of Appeals disagreed. It noted that the legislature defined telecommunication broadly as including the "dissemination" of a communication, and so declined to hold that a direct communication is required for a violation of the harassment statute.¹⁴²

Ripley's real argument was that the "lack of a direct communication" targeting Savannah negated any inference that she had the specific intent to harass.¹⁴³ The court of appeals began its analysis of this issue by noting that *Black's Law Dictionary* defines harassment as "[w]ords, conduct, or action . . . that, being directed at a specific person, . . . alarms or causes substantial emotional distress in the person."¹⁴⁴ The court then explained that the statute creates a

specific-intent crime: the state must prove the defendant's specific purpose to harass. The burden is not met by establishing only that the defendant knew or should have known that her conduct would probably cause harassment. The legislature has created this substantial burden to limit the statute's scope to criminal conduct, not the expression of offensive speech.¹⁴⁵

140. OHIO REV. CODE ANN. § 2917.21(B) (LexisNexis 2004).

141. *Ellison*, 900 N.E.2d at 230.

142. *Id.* at 230 (citing OHIO REV. CODE ANN. § 2913.01 (LexisNexis 2004)).

143. *Ellison*, 900 N.E.2d at 230.

144. *Id.* (quoting BLACK'S LAW DICTIONARY 733 (8th ed. 2004)). The dictionary definition also included "annoys" as a harm, but the court of appeals noted that the legislature had deleted this term from the Ohio harassment statute some years before. *See id.*

145. *Ellison*, 900 N.E.2d at 230.

The court of appeals held that the state failed to prove beyond a reasonable doubt that Ripley's specific intent in posting the statement was to harass Savannah. At trial, the prosecutor had argued that posting the allegation after the JFS could not substantiate the accusation proved that Ripley's purpose was to harass Savannah.¹⁴⁶ The court of appeals found that JFS's finding did not mean the "dissemination of the allegation could not serve the legitimate purpose of warning others of what [Ripley] Ellison believed to be criminal behavior. Moreover, it was undisputed that [Ripley] Ellison never directed a telecommunication to [Savannah] Gerhard despite the opportunity to do so."¹⁴⁷ It reversed the conviction and discharged Ripley from further prosecution based on this incident.¹⁴⁸

While the *Ellison* court focused on whether Ripley had the required specific intent to direct the communication at Savannah, the case also implicated whether Ripley intended for the communications to be seen by others whose reactions were likely to have a negative impact on Savannah. As the court of appeals explained, Ripley's posting of the comment about Savannah on her MySpace page is conduct that differs in several material respects from the conduct involved in direct cyberbullying. First, it was not directed at the victim. It was, instead, put on a website for all to see. Although it is reasonable to infer Ripley knew, or must have known, that Savannah might see the comment, this does not seem to have been her purpose. Instead, it appears she was acting out of a desire to warn people about someone she believed to be a threat to small children. Posting the comment was, therefore, an act of pure speech—communicating information or an opinion to the public—rather than an act in furtherance of a crime.

The resolution of the second issue is more problematic. We know Ripley posted the comment on her MySpace page; we also know that she posted a comment about the alleged molestation on a "contemporary's" MySpace page, and that Savannah was able to view the comment on Ripley's MySpace page. This suggests that

146. *Id.* at 231.

147. *Id.*

148. *Id.*

Ripley's posting was accessible to other students at the high school she and Savannah attended. Because the court did not address the accessibility of this comment, it is impossible to know, with certainty, its potential reach. However, as most MySpace users "leave their profiles open to the public,"¹⁴⁹ it is reasonable to assume that it was widely available. Therefore, while the facts do not establish that Ripley made an intentional, focused effort to get the information out to the broadest audience possible, they do not negate the inference that her purpose was informational. That, though, is enough to prevent the imposition of criminal liability for harassment because, as the court of appeals noted, when a crime requires specific intent, it is not enough to show that the defendant knew or should have known her conduct could constitute harassment.

The other relevant case is *A.B. v. State*.¹⁵⁰ The juvenile known as "A.B." was a student at Greencastle Middle School in Greencastle, Indiana when the 2005-2006 school year began.¹⁵¹ At the time, Shawn Gobert had been principal of Greencastle Middle School for thirteen years.¹⁵² A.B. transferred to another school "sometime" before February 2006, which is when Gobert learned that a

"Mr. Gobert" "profile" had been created on a MySpace . . . page, purportedly by him, and on which A.B. had posted a vulgarity-laced tirade directed against him. In fact, another juvenile, R.B., a friend of A.B. and . . . a student at Greencastle Middle School, had created this false "Mr. Gobert" . . . "profile" and allowed access to it by twenty-six designated "friends," one of whom was A.B. A.B. . . . made her posting about Mr. Gobert on this private "profile." Thereafter, . . . A.B. created her own MySpace

149. Illinois State University Computer Helpdesk, MySpace Privacy Settings and Safer Social Networking, <http://www.helpdesk.ilstu.edu/kb/index.php?kbid=1320> (last visited Sept. 5, 2009).

150. 885 N.E.2d 1223 (Ind. 2008).

151. *Id.* at 1225.

152. *Id.*

“group” page, accessible by the general public, and titled with a vulgar expletive directed against Mr. Gobert and Greencastle schools.¹⁵³

In delinquency proceedings, A.B. was charged with, and convicted of, conduct “that if committed by an adult would constitute Harassment, a class B felony” under Indiana law.¹⁵⁴ A.B. appealed to the Indiana Supreme Court, claiming the evidence did not prove that she acted with the intent required by the Indiana harassment statute.¹⁵⁵ The court agreed and reversed her conviction.¹⁵⁶

The Indiana Supreme Court began its analysis by noting that the harassment statute makes it a crime for one acting with the “intent to harass, annoy, or alarm another person” and “with no intent of legitimate communication” to use a “computer network” either to “communicate with” or “transmit an obscene message or indecent or profane words to a person.”¹⁵⁷ A.B. was charged with violating both provisions, but the Indiana court found this did not affect its analysis because the “intent element is the same for both violations.”¹⁵⁸ It noted that for someone “to commit an act with the intent to harass, annoy, or alarm another person, common sense informs that the person must have a subjective expectation that the offending conduct will likely come to the attention of the person targeted for the harassment, annoyance, or alarm.”¹⁵⁹

The Indiana Supreme Court noted that the counts differed with regard to whether the postings were “publicly accessible.”¹⁶⁰ Four counts were based on “A.B.’s postings on her friend’s false

153. *Id.* According to the Indiana Supreme Court, one of the postings on the fake “Mr. Gobert” page read: “hey you piece of greencastle s**t. what the f**k do you think of me know (sic) that you cant [sic] control me? huh? ha ha ha guess what ill [sic] wear my f**king piercings all day long and to school and you cant [sic] do s**t about it.! ha ha f**king ha! stupid b**tard!” *Id.*

154. *Id.* at 1225 (citing IND. CODE ANN. § 35-45-2-2(a)(4) (LexisNexis 2004)).

155. 885 N.E.2d at 1226.

156. *Id.* at 1228.

157. *Id.* at 1225-26 (quoting IND. CODE ANN. § 35-45-2-2(a)(4) (LexisNexis 2004)).

158. 885 N.E.2d at 1226.

159. *Id.*

160. *Id.*

'Mr. Gobert' private MySpace 'profile,'" while the other two were based on "language used in the public MySpace 'group' page created by A.B."'¹⁶¹ The trial court's written findings of fact did not differentiate between the public and private postings:

Mr. Gobert is the principal. The web site was accessible by other students and the public. It is obvious to the Court that such information, while not directly sent to Mr. Gobert, was going to end up with him, due to the job and standing within the juvenile community.

While the court does not know exactly what [A.B.'s] intent was, from the common sense reading of the displayed message, the Court can not envision any other intent but to harass, annoy or alarm.

[T]he Court can not envision when such communication could be labeled "legitimate."¹⁶²

The Indiana Supreme Court disagreed. It noted that because A.B.'s posting on R.B.'s private MySpace profile could not be seen by anyone except those to whom R.B. had granted access, Gobert was only able to see it after R.B. "authorized him to access the 'profile' during his investigation" of the comments.¹⁶³ As a result, the court found there was no evidence that A.B. expected Gobert to "see or learn about" her posting on R.B.'s private profile.¹⁶⁴ This meant that neither the evidence nor "reasonable inferences" established that when A.B. made her posting on R.B.'s private profile, she had a "subjective expectation that her conduct would likely come to the attention of Mr. Gobert."¹⁶⁵

The Indiana Supreme Court found the analysis differed for the counts that were based on "A.B.'s remarks on her MySpace 'group' page. Because this site was publicly accessible, it may be

161. *Id.*

162. *Id.* at 1226-27 (quoting from Appellant's Appendix) (citations omitted).

163. 885 N.E.2d at 1227.

164. *Id.*

165. *Id.*

reasonably inferred that A.B. had a subjective expectation that her words would likely reach Mr. Gobert.”¹⁶⁶ It concluded, however, that this was not sufficient to establish the intent required by the Indiana harassment statute. As noted above, the statute requires that the person have acted with the “intent to harass, annoy, or alarm another person *but with no intent of legitimate communication.*”¹⁶⁷

The only evidence of A.B.’s intent with regard to the public postings was what she said in this post:

[R.B.] made a harmless joke profile for Mr. Gobert. and [sic] some retarded b**ch printed it out and took it to the office. [R.B.] is expelled, has to go to court, might have to go to girl [sic] school, and has to take the 8th grade over again! that’s [sic] just from the school, her paretns [sic] have grounded her, and took [sic] her computer, she cant [sic] be online untill [sic] 2007! GMS is full of over reacting idiots!¹⁶⁸

The Indiana Supreme Court found this post presented “strong evidence that A.B. intended her ‘group’ page as legitimate communication of her anger and criticism of the disciplinary action of Mr. Gobert . . . against her friend.”¹⁶⁹ It also found that the post made it “impossible for the State to have carried its burden to prove” that A.B. had “no intent of legitimate communication.”¹⁷⁰

166. *Id.*

167. *Id.* at 1225 (emphasis added) (quoting IND. CODE ANN. § 35-45-2-2(a) (LexisNexis 2004)).

168. 885 N.E.2d at 1227.

169. *Id.*

170. *Id.* The Indiana Supreme Court also took issue with the trial court’s finding that “it could not ‘envision’ any intent other than to harass, annoy, or alarm Mr. Gobert . . . [and that] it is . . . more plausible that A.B., then fourteen-years old, merely intended to amuse and gain approval or notoriety from her friends, and/or to generally vent anger for her personal grievances.” *Id.*

3. Analysis

The *A.B.* court's holding is both correct and instructive. While it may not be *impossible* to convict someone who engages in indirect cyberbullying of harassment, it is highly unlikely. When an indirect cyberbully posts ostensibly bullying messages on a website or other online resource the putative victim cannot access, it will be difficult to prove that his or her intention was to harass that person. As we noted earlier, stalking and harassment both assume conduct directed at the victim; they do so because that assumption is implicit in the essential dynamic of traditional, *malum in se* crimes. For such a crime to have been committed, there must have been a perpetrator, actual or contemplated harm, and a victim who was the target of that harm.¹⁷¹ In the physical world, the nexus between perpetrator, victim, and consequent harm is inevitably direct; there is no other way to inflict harm in the real world.¹⁷² Even if the perpetrator uses an intermediary—an accomplice—to inflict the contemplated harm, the nexus between perpetrator and victim is still direct; the accomplice is merely the perpetrator's tool.

When cyberspace is the vector of activity—especially expressive activity—the existence of such a nexus becomes uncertain. We have all said things that could harm others in more or less serious ways, never intending that they reach the person in question. They usually do not because social mores inhibit most of us from telling A what B said about him. Additionally, our reliance on the

171. See, e.g., Susan W. Brenner, *Fantasy Crime: The Role of Criminal Law in Virtual Worlds*, 11 VAND. J. ENT. & TECH. L. 1, 63 (2008) [hereinafter *Fantasy Crime*] (discussing how contemplated—but not realized—harm is the premise underlying the criminalization of inchoate crimes).

172. Even if the perpetrator attempts to inflict harm remotely—by, say, putting a time bomb on the airplane on which the victim will fly—the dynamic still exists. See, e.g., *People v. Grant*, 233 P.2d 660, 667 (Cal. App. 1951) (detailing how defendant committed “acts directly tending toward the commission . . . of murder in that he constructed an incendiary bomb, placed it beyond his control so that it would be delivered to the airplane,” where it would have exploded had it not done so before being loaded on to the plane). Had the bomb gone off as scheduled, Mr. Grant would not have been present when his wife and children perished in the resulting plane crash, but he would still have been the direct cause of their deaths.

presumptive confidentiality of the critiques we share with our friends and family would negate any inference of an intent to harass in the unlikely event we were prosecuted. The idea of prosecuting someone on the basis of such conduct seems absurd,¹⁷³ yet it is functionally analogous to what happened to A.B.

The differentiating factor in *A.B.* (and similar cases) is that the presumptive confidentiality we assume in the real world becomes problematic online, at least when the actor posts comments on a site that is at least potentially accessible to the target of the comments. When we post “irritating or malicious gossip”¹⁷⁴ online, we publish the comments to the world. However, if we post comments without considering whether the target is likely to see them, we do not engage in the premeditated, focused communications involved in direct cyberbullying. Despite this, we have still published communications that have the potential to reach the victim. If our comments actually reach the victim, they may well inflict the type of harm prohibited by harassment and stalking statutes. The problem, as the *A.B.* court noted, lies in the lack of specific intent. Recklessness or negligence cannot (and should not) support the imposition of criminal liability for stalking or harassment.

Stalking and harassment laws are not appropriate ways to deal with this phenomenon because they were crafted to deal with a specific type of malicious communication. The harms they encompass derive from the persistent, intentional violation of an essential norm governing gossip: gossip is shared with people other than the person whom it concerns. Harassment and stalking often involve

173. The drafters of the Model Penal Code found that “penal law need not address itself to . . . irritating or malicious gossip,” and so chose not to include criminal defamation in the final version of the Model Penal Code. Susan W. Brenner, *Should Online Defamation Be Criminalized?*, 76 MISS. L.J. 705, 716 (2007) [hereinafter *Online Defamation*] (citation omitted). See, e.g., Michael Passaportis, *A Law and Norms Critique of the Constitutional Law of Defamation*, 90 VA. L. REV. 1985, 1995 (2004) (discussing the impact of false gossip); see also THE CHAMBERS DICTIONARY 645 (Ian Brookes ed., Chambers 10th ed. 2006) (1901) (defining gossip as “scandalous rumours; . . . someone who goes about telling . . . idle, malicious and scandalous tales” about someone who is not present). Gossip can be true or false.

174. MODEL PENAL CODE § 250.7 cmt. at 45-46 (Tentative Draft No. 13, 1961).

bombarding the victim with what would constitute gossip if it were shared with others.¹⁷⁵ It is this premeditated, malicious targeting of the victim that distinguishes simple (non-criminal) gossip from harassment or stalking. When it comes to gossip, ignorance may not be bliss, but it eliminates any need to use criminal liability to control what is being said about someone.

How should we handle situations in which this malicious targeting is absent but the online circulation of gossip still inflicts harm on the person it concerns? We are dealing with a new problem, one that could not have arisen prior to the Internet (just as telephone harassment did not exist until the use of telephones became common). Until Internet use became common in the 1990s,¹⁷⁶ the publication of material (gossip, rumor, news, etc.) was controlled by the mainstream media. Corporations engaged in disseminating content via print, radio, and television signals. The material the mainstream media publish is limited by two factors. First, the cost involved in publication by traditional means acts as a de facto content filter; publishing material about matters of general public interest is likely to be more profitable than publishing material that will interest only a few people. Second, the possibility of being sued (for defamation, copyright infringement, invasion of privacy, etc.) causes mainstream media companies to rely on a cadre of professional editors, reporters, and other staff, whose collective purpose is to filter content and prevent the publication of actionable material.¹⁷⁷

As a result of potential liability, the mainstream media (i) publish gossip about people whose lives are likely to be of general public interest (celebrities) but (ii) do not publish gossip about non-celebrities, i.e., those whose lives will almost certainly not be of in-

175. In *State v. Ellison*, for example, the prosecution's theory was that "Ellison had posted a 'rumor' on the Internet to harass Gerhard." 900 N.E.2d 228, 230 (Ohio App. 2008). For gossip as rumor, see *supra* note 173. In this discussion we are not concerned with gossip that rises to the level of defamation. We address that issue in the next section.

176. See *Internet*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Internet> (last visited Sept. 7, 2009).

177. See *Online Defamation*, *supra* note 173, at 739-48.

terest to the general public.¹⁷⁸ This meant that prior to the Internet, non-celebrities bore little, if any, risk of having gossip about themselves circulated among a wider audience. Gossip stayed where it had always been—within the localized group comprising the individual's co-workers, acquaintances, friends, and family.

The Internet changed that. Now we all face the prospect of experiencing what was once the sole province of Hollywood celebrities. We can have our own paparazzi, whether we like it or not.¹⁷⁹ Unlike professional paparazzi (who are motivated by profit), our paparazzo (or paparazzi) may be motivated by jealousy, insecurity, or boredom. And unlike those who have traditionally been the targets of paparazzi, we have done nothing to inject ourselves into the public arena.¹⁸⁰ We expect celebrities to shrug off the more or less accurate (but usually embarrassing) gossip paparazzi generate about them; but those of us who are not celebrities are outraged when our own, freelance paparazzi do something similar to us.

Should criminal stalking and harassment laws be expanded to encompass online gossip about private citizens? Here, we are concerned with the general, non-targeted publication involved in indirect cyberbullying. If, as noted earlier, the publication of the material were targeted specifically at the victim, as in direct cyberbullying, it might be possible to prosecute under existing stalking and harassment laws. Indirect cyberbullying raises a different and much more difficult issue: the imposition of criminal liability for the general publication of non-defamatory gossip.¹⁸¹

178. This does not mean, of course, that the mainstream media do not occasionally publish "human interest" stories about charming or dreadful occurrences in the lives of everyday people.

179. For the general phenomenon of online celebrity, see Jason Tanz, *Internet Famous: Julia Allison and the Secrets of Self-Promotion*, WIRED, July 15, 2008, http://www.wired.com/culture/lifestyle/magazine/16-08/howto_allison.

180. See, e.g., Patrick J. McNulty, *The Public Disclosure of Private Facts: There Is Life After Florida Star*, 50 *DRAKE L. REV.* 93, 136 (2001) ("Private citizens . . . have not assumed the risk of reduced privacy as public figures have as part of their bargain for fame and influence.").

181. We consider defamation in the next section.

Celebrities have on occasion sought to use stalking or harassment laws against their paparazzi, but those efforts have been predicated on the trespasses and assaults paparazzi often use to obtain photographs of celebrity targets.¹⁸² Trespasses and physical encounters provide the victim-targeted conduct that is missing in indirect cyberbullying, and therefore make the use of stalking and harassment reasonable in the celebrity paparazzi context. Indirect cyberbullies do not engage in such conduct, which makes the applicability of current stalking and harassment laws problematic in this context.¹⁸³

We seem to be left with two alternatives. One is to expand current criminal stalking or harassment laws so they encompass the generalized publication of gossip that constitutes indirect cyberbullying. The other is to accept our new-found, and perhaps unwelcome, status as "lower-case" public figures, i.e., as someone whose personality, appearance, activities, or predilections can become grist for an amateur online paparazzo (or paparazzi).

While some may find the first alternative appealing, it would be unworkable in practice and is almost certainly unconstitutional. It would be unworkable because the criminal justice system would be inundated with requests for prosecutions, most of which would be denied due to a lack of resources. Rejected requests might lead the original victim to retaliate in kind, which could lead to a consequent, also likely-to-be-rejected request for prosecution by the cyberbully-become-victim. While prosecutions might be brought in a few particularly egregious cases, they would probably do little to discourage determined cyberbullies. As to the constitutional issues, expanded stalking and harassment statutes criminalizing the circulation of simple gossip would likely violate the First

182. See *Sienna Miller wins £53,000 damages from photographers over harassment*, TELEGRAPH (U. K.), Nov. 21, 2008, <http://www.telegraph.co.uk/news/newstoppers/celebritynews/3496197/Sienna-Miller-wins-53000-damages-from-photographers-over-harassment.html>; Howard Gensler, *For 'Stalking' Photog, About-Face in Willis Case*, PHILA. DAILY NEWS, June 20, 2006, 2006 WLNR 10597677.

183. If an indirect cyberbully were to engage in such conduct to acquire gossip he or she could publish online, then the bully might be susceptible to prosecution under existing stalking or harassment laws.

Amendment because they would bar the publication of non-defamatory content and opinion.¹⁸⁴ They would probably also be held void for vagueness due to the difficulty involved in articulating what was, and was not, permissible in online commentary about someone.¹⁸⁵

That leaves the second alternative, which is eminently feasible but more than a little unsatisfying. We would have to tolerate the aggravating attentions of those who choose to become our paparazzi (unless their conduct could be prosecuted under one of the theories we have yet to examine). We would have to accept the proposition that has been bandied about for more than decade: cyberspace transforms everyone into a public figure, or more accurately, cyberspace has the potential to transform everyone into a public figure. If some more or less deranged person decides to spread gossip about us online, we have to deal with it ourselves. We can ignore it or respond in kind or, if the gossip is particularly annoying, try to have it taken off the site on which it is posted. Beyond that, there probably is nothing we can do (absent, again, the applicability of one of the theories examined below).

While this alternative may seem unsettling and unsatisfying to us, that may not always be true. We find this alternative unsatisfying because we are used to a world in which we have been able to ignore what is said about us, at least for the most part. We know, at some level, that our friends, colleagues, and acquaintances gossip

184. See, e.g., Pamela Samuelson, *Principles for Resolving Conflicts Between Trade Secrets and the First Amendment*, 58 HASTINGS L.J. 777, 781 n.19 (2007) (“A city ordinance that forbade residents to gossip about private matters would surely be unconstitutional under the First Amendment”); see also *Bickel v. Burkhardt*, 632 F.2d 1251, 1255 (5th Cir. 1980) (stating that a municipal fire department rule forbidding firemen from “being a party to any malicious gossip” did not violate the First Amendment because it only applied to “false statements made with knowledge of their falsity or made with reckless disregard of whether they are false or true”).

185. See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (discussing the “basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.”); see also *State v. Palendrano*, 293 A.2d 747, 752 (N.J. Super. Law Div. 1972) (noting that a “neighborhood gossip could . . . be indicted as a Common Scold” and holding that the statute making it a crime to be a Common Scold was void for vagueness).

about us behind our backs, but as long as we do not know *what* they say, we can ignore it. When what they say migrates online, it becomes difficult—if not impossible—to ignore. Because we are the products of a real-world culture which dictates that gossip is not to reach the person it concerns, we are likely to be outraged and want the perpetrators sanctioned, somehow. But that reaction may be an historical artifact, the product of a non-networked culture. As one author noted:

In a bygone era, members of a community would gather at the local soda fountain to “chew the fat”—discuss . . . local politics, share the latest gossip, or complain about the weather. These days, millions of people are engaged in the same conversations not over root beer floats at soda fountains, but over keyboards in online communities known as social-networking web sites.¹⁸⁶

As social networking becomes more pervasive, we are likely to become more accustomed to—and more comfortable with—the fact that “chewing the fat” has migrated online, and the attendant reality that gossip can easily leak into wider circulation. If it simply leaks, and is not deliberately directed at the person it concerns (direct cyberbullying), we may have to live with that. The pragmatic assumptions we tend to make about when gossip reaches its target in the real world will no longer be valid, which may make the notion of holding the leaker criminally liable for what he or she has done hopelessly problematic.

B. Defamation

In theory, criminal defamation laws could be used to prosecute cyberbullies, at least in certain instances. In practice, defamation prosecutions are exceedingly unlikely, as we explain below. The first section reviews the history and current status of criminal

186. John S. Wilson, *MySpace, Your Space, or Our Space? New Frontiers in Electronic Evidence*, 86 OR. L. REV. 1201, 1219-20 (2007) (citations omitted).

defamation in the United States; the second analyzes the viability of prosecuting cyberbullies for defamation.

1. The Crime

Defamation is a relatively new crime in Anglo-American law.¹⁸⁷ In the early seventeenth century, the English Court of Star Chamber criminalized defamatory comments directed toward an individual on the theory that “they tend to create breaches of the peace when the defamed . . . undertake to revenge themselves on the defamer.”¹⁸⁸ The Court of Star Chamber used the Roman doctrine of *libellis famosus* to create the new offense, which is why it came to be known as libel.¹⁸⁹ English colonists brought the offense with them when they came to America, and it eventually became part of the criminal law of the states.¹⁹⁰

Since it was meant to prevent dueling and other forms of physical conflict, criminal libel has traditionally been consigned to the category of “offenses against the public peace.”¹⁹¹ The

187. Common law divided defamation into two categories: libel (written defamation) and slander (oral defamation). As several have noted, modern technology blurs the distinction between the two. See Robert J. Hawley, *An Overview of the Uniform Defamation Act*, 3883 PLI/Pat 645, 679 (1992). As a result, most modern defamation cases involve libel, rather than slander. See Karen Alexander Horowitz, *When Is § 230 Immunity Lost: The Transformation from Website Owner to Information Content Provider*, <http://www.lctjournal.washington.edu/Vol3/a014Horowitz.html> (last visited Sept. 6, 2009).

188. Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized*, 13 ALB. L.J. SCI. & TECH. 273, 316 (2003) [hereinafter *Complicit Publication*]; see also ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 489 (Harry W. Jones ed., The Foundation Press 1982) (1957) (“The reason libel was recognized as a crime at common law was because of its tendency to stir up breaches of the peace.”).

189. For more on the history of criminal libel, see *Complicit Publication*, *supra* note 188, at 287-334.

190. See *Online Defamation*, *supra* note 173, at 713-14.

191. See, e.g., PERKINS & BOYCE, *supra* note 188, at 477-92 (including criminal libel in offenses against public peace, which also included fighting, riot, carrying weapons, and forcible entry).

gravamen of the crime was publishing material that was likely "to cause disorder, riot or breach of the peace."¹⁹²

Though it was an established common law crime, criminal libel was rarely prosecuted in the United States in the nineteenth and twentieth centuries, which was one of the reasons the drafters of the Model Penal Code gave for not including it in their template of offenses.¹⁹³ In their commentary on this issue, they said deciding "whether to penalize anything like libel" was "one of the hardest questions" they confronted.¹⁹⁴ They began with the premise that "penal sanctions cannot be justified . . . by the fact that defamation is damaging to a person in ways that entitle him to maintain a civil suit."¹⁹⁵ Noting that penal sanctions are only appropriate for "harmful behavior which exceptionally disturbs the community's sense of security," the drafters of the Model Penal Code considered whether libel falls into this category.¹⁹⁶ They concluded that behavior "exceptionally disturbs the community's sense of security" for either of two reasons: the "harm" inflicted "is very grave, as in rape or murder, so that even the remote possibility of being . . . victimized terrifies us. Or our alarm may, as in the case of petty theft or malicious mischief, derive from the higher likelihood that such lesser harms will be inflicted upon us."¹⁹⁷

The architects of the Model Penal Code found that "personal calumny falls in neither of these classes" and is "therefore inappropriate for penal control," which probably explained "the paucity of prosecutions" and "near desuetude of private criminal libel" laws in the United States.¹⁹⁸ Accordingly, they did not include a libel provision in the final version of the Code.¹⁹⁹ As a result, while

192. *Tucker v. State*, 275 P. 382, 382 (Okla. Crim. App. 1929).

193. *See Online Defamation*, *supra* note 173, at 715-16.

194. MODEL PENAL CODE § 250.7 cmt. at 44 (Tentative Draft No. 13, 1961).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* The drafters also cited First Amendment concerns. *See id.* at 45.

199. *See id.* at 45-46.

libel is included in the criminal codes of some states, it tends to be a minor crime and is almost never prosecuted.²⁰⁰

At least nineteen states criminalize general libel; three others criminalize specific types of libel.²⁰¹ The general libel statutes fall into two categories: those that focus on causing a “breach of the peace”²⁰² and those that focus on publishing a “statement or object tending to . . . impeach the honesty, integrity, virtue, or reputation or expose the natural defects [of someone] and thereby to expose him to public hatred, contempt, or ridicule.”²⁰³ At common law,

200. See, e.g., Edward L. Carter, *Outlaw Speech on the Internet: Examining the Link Between Unique Characteristics of Online Media and Criminal Libel Prosecutions*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 289, 293-97 (2005) (explaining that many states’ libel statutes have been deemed unconstitutional, and that there have been relatively few criminal prosecutions for libel). Every state recognizes a civil cause of action for defamation, but we do not consider civil libel here for two reasons: one is that our focus is on the viability of using criminal liability to control cyberbullying; the other is that civil liability is generally ineffective in discouraging online defamation. See *Online Defamation*, *supra* note 173, at 721-22, 739-48.

201. Florida, for example, defines criminal defamation as speech that “falsely and maliciously” imputes “a want of chastity” to a woman. FLA. STAT. ANN. § 836.04 (West 2006). Massachusetts defines criminal libel as maliciously publishing material intended to “promote hatred of a group of persons” based on their race, color or religion. MASS. ANN. LAWS ch. 278, § 98C (LexisNexis 1992).

202. ALA. CODE § 13A-11-160 (1975). See, e.g., GA. CODE ANN. § 16-11-40(a) (2007) (defining criminal defamation as “communicat[ing] false matter [tending] to provoke a breach of the peace”); VA. CODE ANN. § 18.2-417 (2009) (defining similar provision).

203. COLO. REV. STAT. ANN. § 18-13-105(1) (West 2008). See also IDAHO CODE ANN. § 18-4801 (2004) (defining libel as published information that impeaches “honesty, integrity”); KAN. STAT. ANN. § 21-4004(a) (2007) (same); LA. REV. STAT. ANN. § 14:47 (2007) (same); MINN. STAT. ANN. § 609.765(1) (West 2009) (same); MONT. CODE ANN. § 45-8-212(1) (2007) (same); N.H. REV. STAT. ANN. § 644:11(1) (LexisNexis 2007) (same); N.M. STAT. ANN. § 30-11-1 (West 2003) (same); N.D. CENT. CODE § 12.1-15-01(1) (1997) (same); OKLA. STAT. ANN. tit. 21, § 771 (West 2002) (same); S.C. CODE ANN. § 16-7-150 (2003) (same); UTAH CODE ANN. § 76-9-404(1) (2008) (same); WASH. REV. CODE ANN. § 9.58.010 (West 2003) (same); WIS. STAT. ANN. 942.01(2) (West 2005) (same). The respective interests targeted by the statutes are not necessarily distinct. Exposing someone to “public hatred, contempt or ridicule” at least has the potential to provoke a breach of the peace.

truth was not a defense in a criminal libel prosecution, but at least some of the state criminal libel statutes recognize truth as a defense.²⁰⁴ And while civil libel requires that the defamatory material have been communicated to someone other than the victim, criminal libel only requires that it have been communicated to "a person other than the publisher of the" material.²⁰⁵ The premise that publication to the victim suffices for criminal libel apparently derives from the historical concern with preventing breaches of the peace.²⁰⁶

There is no federal criminal defamation provision.

2. Use Against Cyberbullying

Since criminal defamation does not require that the defamatory material have been communicated directly to the victim, we do not need to incorporate the distinction between direct and indirect cyberbullying into this analysis. Unlike stalking, harassment, and threats, criminal defamation can, but does not necessarily, involve inflicting harm by directly targeting the victim. As we saw in the previous section, its concern is the more or less generalized communication of material that can provoke a breach of the peace and

204. See, e.g., KAN. STAT. ANN. § 21-4004(b) ("It shall be a defense to a charge of criminal defamation if it is found that such matter was true."); LA. REV. STAT. ANN. § 15:443 (2005) (same); MINN. STAT. ANN. § 609.765(3)(1) (same); MISS. CODE ANN. § 97-3-57 (West 2005) (same); N.C. GEN. STAT. § 15-168 (2005) (same); N.D. CENT. CODE § 12.1-15-01(2)(a) (same); OKLA. STAT. ANN. tit. 21, § 774 (same); VT. STAT. ANN. tit. 13, § 6560 (1974) (same); see also MASS. ANN. LAWS ch. 278, § 8 (LexisNexis 2002) (stating that truth is a defense "unless actual malice is proved").

205. N.D. CENT. CODE § 12.1-15-01(3)(c). See *Online Defamation*, *supra* note 173, at 709-10. Cf. RESTATEMENT (SECOND) OF TORTS § 577(1) (1977) (stating that defamatory material must be published "to one other than the person defamed").

206. See *Online Defamation*, *supra* note 173, at 710. See also 50 AM. JUR. 2d, *Libel and Slander* § 507 (2006) (stating that some criminal defamation statutes are specifically intended to prevent breach of the peace). But see KAN. STAT. ANN. § 21-4004(a) (making no reference to breaches of the peace); MINN. STAT. ANN. § 609.765 (same); MONT. CODE ANN. § 45-8-212(2) (same).

expose the person it concerns to "public hatred, contempt, or ridicule."²⁰⁷

Logically, a cyberbully could be prosecuted for criminal defamation if he or she (i) published information to one or more persons²⁰⁸ (ii) that was false and (iii) had the capacity to provoke a breach of the peace or expose the person it concerned to public hatred, contempt, or ridicule. Since our definition of cyberbullying assumes that a bully uses modern communications technology to disseminate information about his or her victim, the first requirement should by definition be met in any cyberbullying case. The second and third requirements are similarly unproblematic; the prosecution will have to prove that the information disseminated by the bully was false and that it had the potential for inflicting the requisite harm(s) on the victim.

The issue that might be problematic is whether the cyberbully acted with "actual malice," as required by *New York Times v. Sullivan*²⁰⁹ and *Garrison v. Louisiana*.²¹⁰ In *Sullivan*, the Supreme Court held that civil liability could not be imposed for defamatory statements about a public official unless the statements were false and made with "actual malice."²¹¹ The *Sullivan* Court defined actual malice as making a statement "with knowledge that it was false or with reckless disregard of whether it was false or not."²¹² The *Garrison* Court applied the *Sullivan* rule to prosecutions for libel and noted that truth is a defense in a libel case.²¹³ Both cases involved the publication of comments that concerned a public official or matters of public concern.²¹⁴

207. See COLO. REV. STAT. ANN. § 18-13-105(1), *supra* note 203 and accompanying text.

208. As we saw in the previous section, in most jurisdictions this includes publishing the material to the victim. For this analysis, it is irrelevant whether a bully communicates the defamatory material directly to the victim or targets the victim indirectly by communicating it to others.

209. 376 U.S. 254 (1964).

210. 379 U.S. 64 (1964).

211. *Sullivan*, 376 U.S. at 280.

212. *Id.*

213. *Garrison*, 379 U.S. at 71-74.

214. See *Sullivan*, 376 U.S. at 256-58 (stating that the newspaper published comments concerning Sullivan's actions as a City Commissioner); *Gar-*

The *Sullivan* and *Garrison* holdings were at issue in *I.M.L. v. State*,²¹⁵ a libel prosecution of a student who posted derogatory comments about the principal and faculty of his high school on a website. Among other things, it described the principal as a "town drunk" and accused him of sleeping with the secretary of the high school."²¹⁶ Other posts accused one teacher of being a homosexual and another of being a drug addict.²¹⁷ *I.M.L.* moved to dismiss the charges, arguing that Utah's criminal libel statute was unconstitutional because it did not require "actual malice" and did not recognize truth as a defense.²¹⁸ The Utah Supreme Court agreed; it held the statute unconstitutional and reversed the trial court's denial of *I.M.L.*'s motion to dismiss the charges.²¹⁹

The *I.M.L.* court seems to have assumed the principal and teachers constituted public figures under the *Sullivan* and *Garrison* holdings.²²⁰ As an Indiana court noted, state courts have disagreed on whether a principal is a public figure for the purposes of requiring actual malice in a defamation case.²²¹ Courts have also dis-

rison, 379 U.S. at 64-66 (recording that a district attorney criticized the local judiciary).

215. 61 P.3d 1038 (Utah 2002).

216. *Id.* at 1040.

217. *See id.*

218. *See id.* at 1041.

219. *See id.* at 1047-48.

220. It might, instead, have assumed that the topics *I.M.L.* addressed in his postings were matters of public concern. *See supra* note 214 and accompanying text. The discussion above is based on the premise that the court assumed they were public figures because this is the approach many courts have taken in resolving the actual malice issue. *See, e.g.,* *Beeching v. Levee*, 764 N.E.2d 669, 677 n.5 (Ind. Ct. App. 2002) (collecting cases).

221. *See Beeching*, 764 N.E.2d at 677 n.5. *Compare* *State v. Defley*, 395 So. 2d 759, 761 (La. 1981) (holding that school superintendent and school supervisor are public officials), *and* *Kapiloff v. Dunn*, 343 A.2d 251, 258 (Md. Ct. Spec. App. 1975) (holding that a principal is a public figure), *with* *Ellerbee v. Mills*, 422 S.E.2d 539, 540 (Ga. 1992) (holding high school principal not a public official), *and* *McCutcheon v. Moran*, 425 N.E.2d 1130, 1133 (Ill. App. Ct. 1981) (same).

agreed on whether a teacher is a public figure under this standard.²²²

While the Supreme Court has not addressed this issue, lower courts have held that “it is inappropriate to require that defamatory false statements must be made with ‘actual malice’ . . . [when] one private person disseminates defamatory statements about another private individual in the victim’s community.”²²³ These courts have noted that the actual malice standard is not

limited to defamation actions brought by public officials and public figures. The Supreme Court has also required that a private person—that is, one who is neither a public official nor a public figure—must . . . prove actual malice to recover presumed or punitive damages for defamation. Although the Supreme Court in *Gertz* . . . rejected the view that a private person must prove actual malice to recover compensatory damages for false defamatory statements concerning an issue of public . . . interest, the Court held that actual malice must be proved . . . to recover presumed or punitive damages. The *Gertz* opinion may be read as stating that actual malice must be proved to recover presumed or punitive damages . . . but *Dun & Bradstreet* . . . clarified that the actual-malice requirement applies only when the

222. See, e.g., *Visentin v. Haldane Cent. Sch. Dist.*, 782 N.Y.S.2d 517, 518 (N.Y. Sup. Ct. 2004) (stating that a teacher is not a public figure); *Belser v. Milford Bd. of Educ.*, No. CV054002886S, 2005 WL 2008428 (Conn. Super. Ct. June 23, 2005) (stating that the public school teacher was a public figure). In *Gertz v. Robert Welch, Inc.*, the Supreme Court said that someone is a public figure when he “achieve[s] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts” or “voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.” 418 U.S. 323, 351 (1974).

223. *People v. Ryan*, 806 P.2d 935, 939 (Colo. 1991).

defamation of the private person involves a matter of public concern.²²⁴

Courts have also found that not requiring actual malice in cases involving private persons and matters that are not of public concern is permissible because "speech on matters of purely private concern is of less First Amendment concern."²²⁵

A federal court therefore held that Colorado's criminal libel statute could "be applied . . . to private defamers who 'knowingly publish or disseminate . . . any statement or object tending . . . to impeach the honesty, integrity, virtue, or reputation of a private individual,' even when no showing of actual malice is made."²²⁶ If that interpretation of the First Amendment is correct, it means that a cyberbully who publishes material defaming a private person (a student or teacher for the purposes of this analysis) can be charged with, and convicted of, criminal defamation as long as he or she published false material that actually inflicted or had the capacity to inflict the harm prohibited by the libel statute at issue. That would open up the possibility of using criminal liability against at least some cyberbullies.²²⁷

A cyberbully might still be able to avoid criminal liability. As one court noted, "[t]he First Amendment also protects ostensibly libelous statements when such statements amount to 'no more than rhetorical hyperbole,' or . . . amount to opinion, satire, or parody that could not reasonably be interpreted as making a factual statement."²²⁸ While the Supreme Court has applied this exception

224. *State v. Powell*, 839 P.2d 139, 142-43 (N.M. Ct. App. 1992) (citing *Gertz*, 418 U.S. 323; *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 751, 761 (1985)).

225. *Dun & Bradstreet*, 472 U.S. at 759. See also *Mink v. Knox*, 566 F. Supp. 2d 1217, 1224 (D. Colo. 2008).

226. *Mink*, 566 F. Supp. 2d at 1224 (quoting *Colorado v. Ryan*, 806 P.2d 935, 939 (Colo. 1991)).

227. A cyberbully could still avoid conviction if he or she proved that the material published was true.

228. *Mink*, 566 F. Supp. 2d at 1224 (quoting *Greenbelt Coop. Publ'g. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970)). See also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (declining to "find that a state's interest in protecting public figures . . . is sufficient to deny First Amendment protection to speech that is patently offensive . . . even when that speech could not reasona-

to defamation cases involving public figures, it has not ruled on whether it also applies to cases involving purely private figures.²²⁹ Some lower courts have assumed that it does apply in this context.²³⁰

The Supreme Court may not have felt it necessary to rule on this issue because, until recently, private persons were unlikely to be the targets of hyperbole, satire, or parodies. Prior to the Internet, the only outlets in which such material could be published were those operated by the mainstream media, such as newspapers, magazines, and television and radio stations. As we saw earlier, certain factors (such as cost and the possibility of being sued) act as de facto filters which limit the content that is published by mainstream media outlets; since the audience for parody or satire involving a "regular person" is likely to be very small, mainstream media outlets have no incentive to publish such material. They tend to focus their efforts on public figures because stories about public figures are more likely to generate a large audience.

As we also saw earlier, cyberspace changes all that and essentially makes each of us a public figure, or more accurately, a potentially public figure. But unlike traditional public figures, we do not inject ourselves into the public domain and do not intentionally seek celebrity status. Should that make a difference?

The rationale for extending First Amendment protection to hyperbole, satire, and parody directed at public figures is that their

bly have been interpreted as stating actual facts about the public figure involved"); *Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974) (holding that statements made in union newsletter were "merely rhetorical hyperbole," and that "permitting state libel judgments . . . would be plainly inconsistent with the union's justifiable reliance on the protection of federal law").

229. See, e.g., Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 OHIO ST. L.J. 665, 757 n.371 (2000) (Responding to a Justice's question during oral argument in the *Hustler Magazine* case, Flynt's lawyer said the exception should apply regardless of whether the case involves public or private figures. The Court did not address this issue in its opinion.). See also *Walko v. Kean Coll. of N.J.*, 561 A.2d 680, 685 (N.J. Super. Ct. Law Div. 1988) (reiterating that the holding in the *Hustler Magazine* case is "explicitly applicable to a 'public figure'").

230. See *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 882 N.E.2d 1011, 1023 (Ill. 2008).

statuses make them foci of legitimate interest among the general population. Therefore, they are legitimate targets for public discussion, opinion, and parody. None of that is true for private figures who become the foci of parody, satire, or hyperbole posted on a website or circulated by e-mail or text messages. They have not sought out public attention, and they are almost certainly not of interest to the general population of the United States. This suggests that they should not be treated the same as the celebrities who have either pursued notoriety or assumed it as an inevitable component of their public positions.

But while these Internet public figures—the “lower-case” public figures—have not sought to become a focus of public commentary and discussion, they have acquired that status, just as any of us will if someone is inclined to feature us on their blog or other online communication. These “lower-case” public figures are, in effect, *de facto* public figures or, perhaps, quasi-public figures. Their character, activities, and predilections may not be of concern to the general public, but they presumably are of some concern to a subset of the general public. When a student creates a MySpace page and uses it to criticize her teacher or parody her appearance or mannerisms, that material will probably be of interest (and amusement) to her peers. And it may serve a useful purpose: it is, in effect, published gossip about one who is of interest to a small subset of the general public. As we saw earlier, gossip can serve useful purposes as long as it does not disintegrate or devolve into comments that could reasonably be interpreted as fact.²³¹

We are confronted again with the task of deciding whether published gossip about those who are not traditional public figures, but who at least arguably constitute quasi-public figures, inflicts harms serious enough to require the use of criminal liability to discourage publication of such material. If the gossip is true, there can be no liability for defamation; if it is not true, there can be no liability if the gossip qualifies as hyperbole, parody, or satire, or if we apply the exception governing such material to quasi-public figures. For the sake of analysis, we will assume that exception applies to

231. *Cf. supra* note 173 and accompanying text (defining and discussing gossip).

the new class of quasi-public figures created by the Internet. It seems, then, that if someone knowingly publishes false and defamatory material about a private citizen (which, by definition, does not fall within this exception), he or she can be prosecuted for and convicted of criminal libel.

Assuming, for the sake of analysis, that the last statement is correct, we need to decide whether the imposition of such liability is appropriate in the educational context. More precisely, we need to decide whether criminal liability should be used to control cyberbullying by minor students (since we are assuming that the imposition of criminal liability against adult teachers and students is permissible). We take up that issue in Part III.

C. Invasion of Privacy

Under current law, criminal invasion of privacy cannot be used to deter cyberbullying in the United States. Only a few states have an invasion of privacy offense, and those target the infliction of a very narrow “harm”: photographing “another person’s intimate parts . . . without that person’s consent.”²³²

232. COLO. REV. STAT. ANN. § 18-7-801(1) (West 2008). A few other states have provisions nearly identical to the Colorado statute. *See* DEL. CODE ANN. tit. 11, § 1335 (2007); HAW. REV. STAT. ANN. § 711-1111 (LexisNexis 1993); ME. REV. STAT. ANN. tit. 17, § 511 (2006). Iowa defines invasion of privacy as viewing, photographing, or filming someone without his or her consent while he or she is in a state of full or partial nudity. *See* IOWA CODE ANN. § 709.21 (West 2003). Idaho, Indiana, Kentucky, Michigan, Mississippi, Missouri, New Hampshire, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin have similar provisions. *See* IDAHO CODE ANN. § 18-6609 (2004); IND. CODE § 35-45-4-5 (LexisNexis 2004); IOWA CODE ANN. § 709.21(1) (West 2003); KY. REV. STAT. ANN. § 531.090 (LexisNexis 2008); MICH. COMP. LAWS ANN. § 750.539j (West 2004); MISS. CODE ANN. § 97-29-61 (1999); MO. ANN. STAT. § 565.253 (West 1999); N.H. REV. STAT. ANN. § 644:9 (LexisNexis 2007); OR. REV. STAT. ANN. § 163.700 (West 2007); 18 PA. CONS. STAT. ANN. § 7507.1 (2000); R.I. GEN. LAWS § 11-64-2 (Supp. 2008); VT. STAT. ANN. tit. 13, § 2605 (Supp. 2008); WASH. REV. CODE ANN. § 9A.44.115 (West 2009); W. VA. CODE § 61-8-28 (LexisNexis 2005); WIS. STAT. ANN. § 942.08 (West 2005). Other states have similar provisions that criminalize “voyeurism.” *See, e.g.,* ARK. CODE ANN. § 5-16-102 (2006); CONN. GEN. STAT. ANN. § 53(a)-189a (West 2007); FLA.

The Restatement (Second) of Torts describes a civil cause of action for giving "publicity to a matter concerning the private life of another."²³³ To be actionable, the material publicized must be (i) "highly offensive to a reasonable person" and (ii) "not of legitimate concern to the public."²³⁴ Unlike civil and criminal defamation, which require only that the defamatory material have been communicated to someone other than the person being defamed, this provision requires that the material have been given "publicity." The Restatement says that "publicity" means "the matter is made public, by communicating it to the public at large," or to so many people it is "substantially certain to become . . . public knowl-

STAT. ANN. § 810.14 (West 2007); LA. REV. STAT. ANN. §§ 14:283 and 14:283.1 (2004); WYO. STAT. ANN. § 6-4-304 (2009).

Most of the state statutes criminalizing "invasions of privacy"—however defined—are voyeurism provisions. That is, they criminalize the act of "spying on" another, usually for the purpose of gaining "sexual pleasure." See, e.g., BLACK'S LAW DICTIONARY 1246 (8th ed. 2004) (defining "Peeping Tom"). See also BLACK'S LAW DICTIONARY 1714 (8th ed. 2004) (defining "Voyeur"). The remaining statutes, like the Model Penal Code provision, derive from the common law crime of eavesdropping, which targeted the "harm" of violating the privacy of someone's home. See 4 WILLIAM BLACKSTONE, COMMENTARIES *168 (Wayne Morrison ed., Cavendish Publishing 2001) (1769). See also *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1896 (1981) (explaining that loss of privacy offenses, such as being a Peeping Tom and eavesdropping, derive from common law trespass).

As we will see, these statutes really do not apply to the conduct that constitutes cyberbullying. Voyeurism and eavesdropping statutes criminalize the act of intruding on someone's privacy without being authorized to do so; they do not encompass disseminating information one has obtained about another either by violating his or her privacy or by using authorized means to acquire the information. A few states make it a crime to "publish" images obtained in violation of a voyeurism statute, but these provisions do not apply unless the image was obtained without the "victim's" permission. See, e.g., IDAHO CODE ANN. § 18-6609 (2004); KY. REV. STAT. ANN. § 531.100 (West 2008); R.I. GEN. LAWS § 11-64-2 (Supp. 2008). This crime, therefore, is also predicated on the act of violating someone's privacy, not on the act of publishing consensually-obtained information about someone.

233. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

234. *Id.* For what is "highly offensive," see § 652D cmt. c. For what is not a "matter of legitimate public concern," see § 652D cmt. d.

edge.”²³⁵ We will not analyze the utility of employing this option against cyberbullies for two reasons: one is that our exclusive focus is criminal law; the other is that civil liability is usually not a viable option in dealing with the online publication of harmful material because the defendants tend to be judgment-proof.²³⁶

If we thought it advisable, we could create a criminal analogue of the tort of publicizing matters concerning someone’s private life. Such a step does not, however, seem advisable. It is unlikely that such an offense would be effective in combating cyberbullying because it would reach only the publication of facts not known to others.²³⁷ A 2007 study of cyberbullying among teens found that it most often involved the following: forwarding an e-mail, IM, or text message from the victim; spreading rumors about the victim; sending a threatening or “aggressive” e-mail, IM, or text message; or posting an embarrassing picture of the victim online.²³⁸

Neither of the first two would qualify as giving publicity to a matter concerning the victim’s private life under a criminal analogue of the tort. E-mails or other communications sent to someone are not “private”; one assumes the risk that the recipient will share the communication with others.²³⁹ Threats are not private (and if they were, the privacy would belong to the party sending the threatening communication, not to the recipient).²⁴⁰ Finally, posting an embarrassing photo of someone would not qualify under the

235. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

236. *Online Defamation*, *supra* note 173, at 739-48.

237. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977).

238. See AMANDA LENHART, PEW INTERNET & AMERICAN LIFE PROJECT, CYBERBULLYING AND ONLINE TEENS 1 (June 27, 2007), http://www.pewinternet.org/~media/Files/Reports/2007/PIP_Cyberbullying_Memo.pdf.pdf.

239. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977). See also, e.g., *S.B. v. Saint James Sch.*, 959 So. 2d 72, 91-92 (Ala. 2006) (finding no invasion of privacy where female students voluntarily e-mailed lewd photographs of themselves to male student and male student did not disseminate them to anyone else); *Campbell v. Woodard Photo., Inc.*, 433 F. Supp. 2d 857, 862 (N.D. Ohio 2006) (holding employer not liable for invasion of privacy where officer confiscated employee’s personal items while escorting employee off of employer’s premises after termination).

240. See *infra* Part II.D.

criminal offense we are postulating unless the photograph was taken without the victim's permission and at a time or in a context in which he or she had a legitimate expectation of privacy.²⁴¹ Since that does not seem to be the case with photos used in cyberbullying, there is no reason to create a criminal invasion of privacy crime, at least not for this purpose.

There is no federal criminal analogue of the Restatement of Torts's cause of action for giving publicity to the private life of another. Like most, if not all, states, the federal system makes it a crime affirmatively to violate someone's privacy by, say, intercepting his telephone calls, but does not make the dissemination of information about another's private life a crime.²⁴²

D. Threats

A "threat" is similar to a promise: When A threatens B, he articulates an intention to do something harmful to B or to someone or something B cares about.²⁴³ Threats were not a crime at

241. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977); see also *Gill v. Hearst Publ'g Co.*, 253 P.2d 441, 442-45 (Cal. 1953) (finding that where husband and wife did not consent to the publication of a photograph of them in an affectionate, but not obscene, posture, publication was not an invasion of privacy).

242. See 18 U.S.C. § 2511(1) (2006). The Model Penal Code includes a similar provision. See MODEL PENAL CODE § 250.12 (1961). The first section of Section 250.12 criminalizes eavesdropping or visual surveillance "in a 'private place.'" See MODEL PENAL CODE § 250.12(1). The eavesdropping or surveillance can be accomplished in person or by electronic means. See *id.* Ohio, South Carolina, and Utah have codified versions of this provision. See OHIO REV. CODE ANN. § 2907.08 (West 2006); S.C. CODE ANN. § 16-17-470 (2003); UTAH CODE ANN. § 76-9-402 (2008). The second section of Section 250.12 makes it a misdemeanor to intercept or disclose the contents of a private message. See MODEL PENAL CODE § 250.12(1). Washington has codified this provision, while North Carolina adopted a version making it a crime to "violate the privacy" of telegrams. See WASH. REV. CODE ANN. §§ 9.73.010, .020 (West 2003); N.C. GEN. STAT. ANN. § 14-371 (West 2007).

243. See, e.g., Glenn R. Butterson, *Signals, Threats, and Deterrence: Alive and Well in the Taiwan Strait*, 47 CATH. U. L. REV. 51, 78 (1997) (stating that a threat is a promise to do something bad to someone in the future).

common law,²⁴⁴ but the common law victim of threats was not entirely without recourse. He or she could “bring the threatener before a magistrate for the purpose of requiring him to post bond not to breach the peace by committing the offense threatened.”²⁴⁵

1.The Crime

The criminalization of threats is traceable to the Model Penal Code. In Section 211.3 of the Code, the drafters criminalized threatening “to commit any crime of violence with purpose to terrorize another or to cause evacuation of a building . . . or otherwise to cause serious public inconvenience.”²⁴⁶ The commentary for the section says it was intended to prevent “serious alarm for personal safety.”²⁴⁷ This and other portions of the commentary for Section 211.3 indicate that the criminalization of threats was intended to encompass the infliction of emotional distress.²⁴⁸ The Supreme Court seems to have adopted this interpretation of “threat” crimes in *Virginia v. Black*.²⁴⁹ In *Black*, the Court explained that the “speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats ‘protect[s] individuals from the fear of violence’ and ‘from the disruption that fear engenders,’ in addition to protecting people ‘from the possibility that the threatened violence will occur.’”²⁵⁰

244. See *Postell v. United States*, 282 A.2d 551, 553 (D.C. 1971) (“The crime of oral threats to do bodily harm was unknown to the common law.”); see also *People v. Toledo*, 96 Cal. Rptr. 2d 640, 654 (Ct. App. 2000) (citing the elements of a terroristic threat); *United States v. Metzdorf*, 252 F. 933, 937 (D. Mont. 1918) (*disapproved by United States v. Smith*, 670 F.2d 921 (10th Cir. 1982)).

245. *State v. Hamre*, 429 P.2d 804, 806 (1967).

246. MODEL PENAL CODE § 211.3 (Proposed Official Draft 1962).

247. *Id.* § 211.3 cmt.

248. See *id.* (“Even where the actor has no intention of actually carrying out his threat, it occasions certain identifiable harms that are appropriate for redress by the penal law.”).

249. 538 U.S. 343 (2003).

250. *Id.* at 359-60 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

Some say threat crimes are purely inchoate offenses, on the premise that the threat is a preliminary step in the consummation of an act of violence.²⁵¹ Under this view, criminalization of threats is functionally analogous to the criminalization of attempts, conspiracy, and solicitation; the purpose is to let the law intervene before the person who is preparing to commit a crime can actually do so.²⁵² Those who subscribe to this interpretation of threat crimes argue that it is also supported by the restrictions the First Amendment imposes on criminalizing speech. The theory is that (i) since only "true threats" can constitutionally be criminalized and (ii) since "true threats" require that the speaker demonstrate an "unequivocal, unconditional" intent "to inflict injury," (iii) a "true threat" can be criminalized without violating the First Amendment because it is a step toward the consummation of a proscribed act.²⁵³

251. See, e.g., Peter Alldridge, *The Moral Limits of the Crime of Money Laundering*, 5 BUFF. CRIM. L. REV. 279, 288-89 (2001) ("There is now a large group of statutory inchoate offenses In consequence of these statutes, criminal law now enjoins conduct that is significantly earlier in time, and further removed causally from the consummated offense[.]"); Robert Kurman Kelner, Note, *United States v. Jake Baker: Revisiting Threats and the First Amendment*, 84 VA. L. REV. 287, 311-12 (1998) ("Like laws against such inchoate crimes as conspiracy and attempt, laws against threats arguably serve to nip potential violence in the bud."); see also *United States v. Kelner*, 534 F.2d 1020, 1026-27 (2d Cir. 1976) The court stated:

[R]equirement of a proof of a "true threat" . . . works ultimately to much the same purpose and effect as would a requirement of proof of specific intent to execute the threat because both requirements focus on threats which are so unambiguous and have such immediacy that they convincingly express an intention of being carried out.

Id.

252. See Herbert Wechsler, William Kenneth Jones & Harold L. Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 571-72 (1961).

253. See *Kelner*, 534 F.2d at 1027.

Like others, we do not see these positions as irreconcilable.²⁵⁴ We will therefore analyze the viability of using threat crimes as construed under either approach to control cyberbullying.

As to the threat crimes themselves, many states follow the Model Penal Code by criminalizing “terroristic threats.”²⁵⁵ Others

254. See G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. REV. 829, 1061-62 (2002) (“To the degree that the jurisprudence of ‘true threats’ is focused not only on fear or disruption but also on the prevention of threatened conduct that might endanger life (or . . . other protected interests), its focus is mistakenly shifted . . . to that of an inchoate offense.”); see also *People v. Pardew*, No. D043413, 2004 WL 3017286, at *3 (Cal. Ct. App. Dec. 30, 2004) (holding that a threat communicated to an unintended victim that causes fear in the victim has still committed the crime of criminal threat) (negative appellate treatment).

255. See, e.g., ALA. CODE § 13A-10-15 (2005) (criminalizing terrorizing another individual, disrupting school activities, or causing the evacuation of a building or place of assembly); ALASKA STAT. § 11.56.807 (2008) (similar provision but requires the threat-maker to use some type of chemical weapon); ARK. CODE ANN. § 5-13-301 (2006) (defining terroristic threat as threatening death or serious injury to another person and in particular a teacher or school employee in the line of duty); DEL. CODE ANN. tit. 11, § 621 (2007) (criminalizing traditional threats as well as those causing the evacuation of buildings and public places); GA. CODE ANN. § 16-11-37 (2007) (similar provision but also criminalizing threats to release hazardous chemicals); HAW. REV. STAT. ANN. § 707-716 (LexisNexis 1993) (specifically adding threats against educational workers to definition of terroristic threats); 720 ILL. COMP. STAT. 5/29D-20 (2003) (providing a detailed definition of “terroristic threat” to include threats to computer networks, livestock, food and water supplies, and public buildings); KY. REV. STAT. ANN. § 508.080 (West 2008) (terroristic threats are those that threaten an individual or cause evacuation of a building); MINN. STAT. ANN. § 609.713 (West 2009) (same); MO. ANN. STAT. § 574.115 (West 2003) (similar provision but requires the lives of at least ten people to be threatened); NEB. REV. STAT. § 28-311.01 (2008) (criminalizing threats made to an individual’s life or which cause evacuation of a building); N.J. STAT. ANN. § 2C:12-3 (West 2005) (same); N.Y. PENAL LAW § 490.20 (McKinney 2008) (defining terroristic threats as those which intend to intimidate a population or coerce the government); 18 PA. CONS. STAT. § 2706 (2000) (terroristic threats are those that threaten an individual’s life or cause evacuation); S.D. CODIFIED LAWS § 22-8-13 (2004) (similar to the New York statute); TEX. PENAL CODE ANN. § 22.07 (Vernon 2003) (similar to the New York and Illinois statutes); see also ARIZ. REV. STAT. ANN. § 13-1202 (2001) (traditional threat statute that also criminalizes threats which cause evacuation or public

reach essentially the same result by creating the crime of "threatening."²⁵⁶ Connecticut's general "threatening" statute is a good example of a statute that falls into the latter category:

A person is guilty of threatening . . . when: (1) By physical threat, such person intentionally places or attempts to place another . . . in fear of imminent serious physical injury, (2) such person threatens to commit any crime of violence with the intent to terrorize another person, or (3) such person threatens to commit such crime of violence in reckless disregard of the risk of causing such terror.²⁵⁷

Pennsylvania's general threat statute is similar, but adds the Model Penal Code elements of causing the evacuation of a building (or other "public inconvenience"):

A person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to:
(1) commit any crime of violence with intent to terrorize another;

inconvenience); CONN. GEN. STAT. ANN. § 53a-62 (West 2007) (traditional threat statute criminalizing "terrorizing" another); ME. REV. STAT. ANN. tit. 17-A, § 209 (2006) (criminal threats are those which cause victim to fear death or serious bodily injury); MASS. GEN. LAWS ANN. ch. 269, § 14(b) (West 2009) (criminalizing threats involving chemical weapons, hijacking, and disruption of school); N.H. REV. STAT. ANN. § 631:4a (LexisNexis 2007) (criminalizing threats to certain government officials); OKLA. STAT. ANN. tit. 21, § 1172(A)(2) (West 2002) (dealing with threats made via electronic communications); VA. CODE ANN. § 18.2-60(A)(1) (2009) (traditional threat statute specifying threats made on school property or directed toward it). Several states seem to have revised their "terroristic threat" statutes in the wake of the attacks of September 11, 2001, so that they now encompass threats by terrorists as such. See OHIO REV. CODE ANN. § 2909.23 (West 2006); S.C. CODE ANN. § 16-23-750 (2003); UTAH CODE ANN. § 76-5-107 (2008).

256. See ARIZ. REV. STAT. ANN. § 13-1202 (2001); CONN. GEN. STAT. ANN. § 53a-62 (West 2007); ME. REV. STAT. ANN. tit. 17-A, § 209 (2006); N.H. REV. STAT. ANN. § 631:4 (2007); OKLA. STAT. ANN. tit. 21, § 1172(A)(2) (West 2002).

257. CONN. GEN. STAT. ANN. § 53a-62(a) (West 2007).

- (2) cause evacuation of a building, place of assembly or facility of public transportation; or
- (3) otherwise cause serious public inconvenience, or cause terror or serious public inconvenience with reckless disregard of the risk of causing such terror or inconvenience.²⁵⁸

While the Pennsylvania statute tracks the language of the Model Penal Code's provision, it updates the crime by defining "communicates" as "conveys in person or by written or electronic means, including telephone, electronic mail, Internet, facsimile, telex, and similar transmissions."²⁵⁹ A few other states achieve the same result by different means.²⁶⁰

Some state statutes address (at least in part) threats directed at schools or teachers. Arkansas's "terroristic threatening" statute, for example, makes it a crime if someone, acting "[w]ith the purpose of terrorizing another person, . . . cause[s] physical injury or property damage to a teacher or other school employee acting in the line of duty."²⁶¹ This statute does not define school, but a companion provision—which makes it a crime to threaten a school employee or student with death—defines school as an "elementary school, junior high school or high school; technical institute or post-

258. 18 PA. CONS. STAT. § 2706(a) (2000).

259. 18 PA. CONS. STAT. § 2706(e) (2000).

260. *See, e.g.*, OKLA. STAT. ANN. tit. 21, § 1172(A)(2) (West 2002); VA. CODE ANN. § 18.2-60(A)(1) (2009).

261. ARK. CODE ANN. § 5-13-301(a)(1)(B) (2006). *See also* MASS. ANN. LAWS ch. 269, § 14(c) (LexisNexis 2009) (criminalizing threats that lead to serious disruptions of schools, school related events, and school transportation). The Arkansas statute also makes it a crime to threaten someone with "death or serious physical injury or substantial property damage." *See* ARK. CODE ANN. § 5-13-301(a)(1)(A) (2006). California makes it a crime to threaten "any officer or employee of any public or private educational institution" with "unlawful injury" in order to coerce him or her "to do, or refrain from doing, any act" in the performance of their duties. CAL. PENAL CODE § 71 (West 1999). South Carolina makes it a crime to threaten to "take the life of or inflict bodily harm upon" an elementary or secondary school teacher or principal or a member of his or her immediate family "if the threat is directly related to the . . . teacher's . . . or principal's professional responsibilities." S.C. CODE ANN. § 16-3-1040(A) (2003).

secondary vocational-technical school; or [t]wo-year or four-year college or university.”²⁶²

Idaho takes a different approach to school threats. It makes it a crime for “[a]ny person, including a student, [to] willfully threaten[] on school grounds by word or act to use a firearm or other deadly or dangerous weapon to do violence to any other person on school grounds.”²⁶³ The statute defines “school grounds” as being “in, or on the property of, a public or private elementary or secondary school.”²⁶⁴

Virginia has a similar statute penalizing the communication of

a threat, in a writing, including an electronically transmitted communication . . . , to kill or do bodily harm, (i) on the grounds or premises of any elementary, middle or secondary school property, (ii) at any elementary, middle or secondary school-sponsored event or (iii) on a school bus . . . and the threat would place the person who is the object of the threat in reasonable apprehension of death or bodily harm.²⁶⁵

A separate provision makes it a much less serious crime to threaten to “kill or to do bodily injury” to “any employee of any elementary, middle or secondary school, while on a school bus, on school property or at a school-sponsored activity.”²⁶⁶

262. ARK. CODE ANN. § 5-17-101(d) (2006). *See also* TENN. CODE ANN. § 39-13-114(a) (Supp. 2008) (defining school in a similar way). For the Arkansas death threat offense, see ARK. CODE ANN. § 5-17-101(a) (2006). Tennessee makes it a crime to threaten a school employee with death. *See* TENN. CODE ANN. § 39-13-114(b) (Supp. 2008).

263. IDAHO CODE ANN. § 18-3302I(1)(a) (Supp. 2009). The prosecution does not have to prove that the person “actually intended to carry out the threat.” *See id.* § 18-3302I(1)(b).

264. *Id.* § 18-3302I(2)(c).

265. VA. CODE ANN. § 18.2-60(A)(2) (2009). One who communicates such a threat commits the crime “regardless of whether the person who is the object of the threat actually receives the threat.” *Id.*

266. *Id.* § 18.2-60(B). The oral threat crime is a misdemeanor. *See id.* The written threat crime is a Class 6 felony. *Id.* § 18.2-60(A)(2).

Kentucky's "terroristic threatening in the first degree" statute also focuses on conduct that targets school property, but takes a different approach to threatening. The statute makes it a crime for someone to

[i]ntentionally make[] false statements that he or she or another . . . has placed a weapon of mass destruction on: (1) The real property or any building of any . . . elementary or secondary school, vocational school, or institution of post-secondary education; (2) [a] school bus or other vehicle . . . [owned or used by a school]; (3) The real property or any building . . . that is the site of an official school-sanctioned function.²⁶⁷

Kentucky's "terroristic threatening in the second degree" statute makes it a crime to "threaten[] to commit any act likely to result in death or serious physical injury to" a student, teacher, or other school employee or anyone "reasonably expected to lawfully be on school property or at a school-sanctioned activity, if the threat is related to their employment by a school, . . . attendance at school, or a school function."²⁶⁸

Federal law includes a general threat crime of much narrower focus than the Model Penal Code's terroristic threat provision or any of the statutes described above. The federal statute makes it a crime to transmit "in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another."²⁶⁹ The statute has been interpreted as encompassing threats sent by electronic means, such as

267. KY. REV. STAT. ANN. § 508.075(1)(a)(1)-(3) (2008). Washington makes it a crime "to threaten to bomb or otherwise injure any public or private school building." WASH. REV. CODE ANN. § 9.61.160(1) (West Supp. 2009). *See also* S.D. CODIFIED LAWS § 22-14A-24 (2005) (penalizing the use of a substance or device to communicate a threat that causes inconvenience or disruption of school or school related event).

268. KY. REV. STAT. ANN. § 508.078(1)(a) (2008).

269. 18 U.S.C. § 875(c) (2006).

e-mail.²⁷⁰ There is no school- or teacher-specific federal threat crime.

2. Use Against Cyberbullying

In analyzing the use of threat statutes against cyberbullies, we need to consider direct and indirect cyberbullying separately. The definitions of the two types of cyberbullying are the same as the definitions we used earlier.²⁷¹

a. Direct Cyberbullying

This alternative is the most likely to be susceptible to prosecution under threat statutes because it preserves the essential threat dynamic. As noted earlier, a threat is analogous to a promise; that is, it is a statement of an intention to do (or not to do) something that one person makes to another. Threats need not be explicit; they can be inferred from conduct, but the conduct must still be directed at the prospective victim.

E-mail and instant (or text) messaging are the cyber-vehicles primarily used to transmit threats in direct cyberbullying, though social networking sites like MySpace and Facebook have also been used for this purpose.²⁷² The medium is irrelevant, though: as long as the alleged threat was sent directly to the prospective victim, it satisfies the threshold requirement for a threat. If the other requirements (the sender says he or she intends to harm

270. See, e.g., *Irizarry v. United States*, 128 S. Ct. 2198, 2200 (2008) (reviewing defendant's sentence after defendant pleaded guilty to violating statute when he sent e-mail threatening to kill his ex-wife and her new husband); *United States v. Poirier*, 52 F. App'x 796, 797 (6th Cir. 2002) (reviewing denial of defendant's request to withdraw guilty plea with regard to defendant's transmission of an e-mail threatening to kill employees of company).

271. See discussion *supra* Part II.A.2.a-b.

272. See, e.g., *High School Student Arrested for Threatening Classmates on MySpace*, CHARLOTTESVILLE NEWSPLEX, Oct. 22, 2008, <http://www.charlottesville-newsplex.tv/home/headlines/32363969.html> ("Police said the 17-year-old male student sent death threats to two female classmates on the social networking site . . .").

the victim or someone or something he or she cares about) are met, the message is a threat.²⁷³

A single message is enough to warrant prosecution. Stalking and harassment statutes require repeated hostile or unsettling communications for the commission of either offense, because both offenses are concerned primarily, if not exclusively, with the infliction of emotional distress.²⁷⁴ For someone to be convicted of violating non-credible-threat stalking and harassment statutes, it is not necessary that the cyberbully have communicated an intention to cause physical harm or even the death of the victim.²⁷⁵ The infliction of emotional harm resulting from his or her conduct is the gravamen of both crimes.²⁷⁶ As we saw above, the perpetrator's persistence in targeting the victim is the device used to distinguish the casual, non-criminal infliction of emotional distress from the dedicated, malicious infliction of distress criminalized by stalking and harassment statutes.

273. See, e.g., *Barmore v. Aidala*, 419 F. Supp. 2d 193 (N.D.N.Y. 2005) (white high-school students sent "various life threatening emails and/or instant messages" to black student), *complaint dismissed*, No. 04-CV-0445, 2006 U.S. Dist. LEXIS 46940 (N.D.N.Y. July 12, 2006); see also *United States v. Knatz*, No. 06-14066-CR, 2006 WL 5844814, at *2 (S.D. Fla. Dec. 6, 2006) (Defendant sent e-mails to faculty at New York University threatening "to shoot deans, professors, secretaries, students and others."). See generally Priyanka Dayal, *Cell Phone Use Huge with Students*, WORCESTER TELEGRAM & GAZETTE, Jan. 29, 2009, 2009 WLNR 1959012 (students using text messaging and social networking sites to send threats to each other).

If e-mail or other online communications threaten the victim with something other than harm to herself or someone or something she cares about, the defendant may be charged with additional crimes. See, e.g., Brad Hicks, *Child Porn Trial Set for March 9*, TIMES-TRIBUNE (Corbin, Ky.), Jan. 6, 2009, 2009 WLNR 266561 (University student who sent female student e-mails threatening to "divulge images of her engaged in sexual activity unless she sent him sexually explicit videos and images of herself" was charged with possessing child pornography and accessing e-mail accounts of others).

274. See discussion *supra* Part II.A.1.

275. Since credible threat stalking and harassment statutes simply define threat crimes, we do not analyze them separately. See discussion *supra* Part II.A. The analysis that applies to traditional threat crimes will also apply to these modified threat crimes.

276. See discussion *supra* Part II.A.1.

Threat crimes do not require persistent conduct by the perpetrator (though this is not uncommon). A single threat suffices for the imposition of liability because while threat crimes are concerned with emotional distress, they are more concerned with letting law enforcement intervene to prevent the infliction of physical injury. In this regard, then, the inchoate element of threat crimes eclipses the emotional distress component of the crime.

b. Indirect Cyberbullying

The use of threat crimes against indirect cyberbullying will be problematic because indirect cyberbullying distorts—if it does not eliminate—the essential threat dynamic, i.e., the perpetrator's directly targeting the victim. The case that best illustrates this is *United States v. Alkhabaz*.²⁷⁷

Abraham Jacob Alkhabaz was charged with violating the federal threat statute making it a crime to transmit a threat to kidnap or injure someone via interstate or foreign commerce.²⁷⁸ Alkhabaz, then a student at the University of Michigan, had posted "fictional stories to 'alt.sex.stories' [a Usenet] news group."²⁷⁹ The stories described "the abduction, rape, torture, mutilation, and murder of women"; one of the stories described the "torture, rape, and murder" of a woman with the same name as one of Alkhabaz's classmates.²⁸⁰ An "alarmed citizen" saw the story and notified the University, which initiated an investigation resulting in Alkhabaz's being charged with violating the threat statute.²⁸¹ The charges were not based on the story Alkhabaz posted online; they were, instead, based on e-mails he exchanged with "Arthur Gonda," an alt.sex.stories fan who corresponded with Alkhabaz about their mutual interest in "violence against women and girls."²⁸²

277. 104 F.3d 1492 (6th Cir. 1997).

278. *Id.* at 1493. Defendant was charged with one count under 18 U.S.C. § 875(c); a superseding five count indictment under the same statute was returned the next month. *Id.*

279. *Id.*

280. *Id.*

281. *Id.* at 1498 (Krupansky, J., dissenting).

282. *Id.* at 1493 (majority opinion).

Alkhabaz moved to dismiss the charges, arguing that the e-mails were not “true threats” and were, therefore, protected by the First Amendment.²⁸³ The district court granted the motion. The government appealed, but the Sixth Circuit upheld the dismissal.²⁸⁴ The Sixth Circuit found, in effect, that the e-mails between Alkhabaz and Gonda did not constitute “true threats” because they were not sent to the victim.²⁸⁵ Further, there was no reason to believe the victim would see what they wrote.²⁸⁶ The Sixth Circuit held that to constitute a “true threat,” a communication must (i) be such that a reasonable person would interpret it as a serious expression of an intent to inflict bodily harm on the victim and (ii) be communicated for the purpose of intimidating the victim in order to “effect some change or achieve some goal.”²⁸⁷ The Sixth Circuit found that even if a reasonable person would interpret the Alkhabaz-Gonda e-mails as expressing an intention to inflict bodily harm, no reasonable person would perceive them as being intended to intimidate the victim.²⁸⁸ It concluded that the e-mails were sent “in an attempt to foster a friendship based on shared sexual fantasies.”²⁸⁹

Courts have applied this analysis in holding that comments students posted on websites did not constitute “true threats.” In *Mahaffey ex rel. Mahaffey v. Aldrich*,²⁹⁰ a Michigan high school suspended a student after the principal and other staff members saw comments he posted on a site called “Satan’s web page.”²⁹¹ The school representatives seem to have been particularly concerned about two aspects of the site: the list of “people I wish would die” and an entry entitled “SATAN’S MISSION FOR YOU THIS

283. *Id.*

284. *Id.*

285. *Id.* at 1494-95.

286. *See id.* at 1496 (“If an otherwise threatening communication is not, from an objective standpoint, transmitted for the purpose of intimidation, then it is unlikely that the recipient will be intimidated or that the recipient’s peace of mind will be disturbed.”).

287. *Id.* at 1495.

288. *Id.* at 1496.

289. *Id.*

290. 236 F. Supp. 2d 779 (E.D. Mich. 2002).

291. *Id.* at 781.

WEEK: Stab someone for no reason then set them on fire throw them off of a cliff, watch them suffer and . . . just before everything goes black, spit on their face.”²⁹² The student was allowed to return to the school after a disciplinary hearing was held, but chose not to (he graduated from another school and his parents sued the original school district).²⁹³

One of their claims was that the school district deprived their son of his rights under the First Amendment. The school argued that the statements on the website were “true threats” and were therefore unprotected by the First Amendment.²⁹⁴ The district court disagreed. It found, first of all, that there was no evidence the student “communicated the statements on the website to anyone.”²⁹⁵ The court noted that “although other students [at the high school] did see the website, there is no evidence that they did so because [the suspended student] ‘communicated’ the website to them or intended to do so.”²⁹⁶ The court also found that “a reasonable person in [the suspended student’s] place would not foresee that the statements on the website would be interpreted as a serious expression of an intent to harm or kill anyone listed on the website.”²⁹⁷

Other courts have reached similar conclusions.²⁹⁸ While these cases all involved civil suits, a court is likely to reach the same conclusion in a criminal prosecution, just as the Sixth Circuit did in *Alkhabaz*. So far, none of the cases has involved a website on which the owner or user posts a direct threat to harm someone (such as “I am going to kill John Doe, who is in my algebra class,

292. *Id.* at 782.

293. *Id.* at 783.

294. *Id.* at 785-86.

295. *Id.* at 786.

296. *Id.*

297. *Id.* (explaining that his “listing of names under the heading ‘people I wish would die,’ did not constitute a threat to the people listed therein any more than [his] listing of names under the heading ‘people that are cool,’ make those listed therein ‘cool’”).

298. See, e.g., *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 859 (Pa. 2002) (finding a student’s website which explained reasons why a teacher at the school should die was crude and offensive, but not a “serious expression of intent to inflict harm”). See discussion *supra* Part I.A.2.

because I hate him"). If and when such a case arises, courts will have to decide if the post constitutes a "true threat" under the *Alk-habaz* analysis.

Such a posting could be read as a serious expression of an intention to inflict bodily harm on the victim, but this probably would not be enough to support a prosecution for threats. If the message is simply posted on a site and there is no reason to believe the ostensible victim will see it, the prosecution would not be able to prove that the poster acted with the purpose of intimidating the victim in order to achieve some goal or effect some change. In other words, the second element—the impact on the victim—would be missing.

Would this element be established if the poster put the comment on a website he knew she was likely to see? That would certainly be a stronger case, but whether it would be enough to warrant charging the poster with threatening the ostensible victim would probably depend on other factors, such as the context of the posting (joke or serious statement?) and the likelihood that the victim would see it. Another issue that should probably be factored into this analysis is the age of the poster and the nature of the putative threat. The Pennsylvania Supreme Court did this in *J.S. v. Bethlehem Area School District*.²⁹⁹ In that case, an eighth-grader created a website that devoted several pages to his algebra teacher, Mrs. Fulmer. As Part I explained, the school expelled the student and his parents sued, claiming his comments on the website were protected by the First Amendment. After considering various factors—such as that the statements were not communicated directly to Mrs. Fulmer—the Pennsylvania Supreme Court found that the statements did not constitute "true threats" because the site

taken as a whole, was a sophomoric, crude, highly offensive[,] and perhaps misguided attempt at humor or parody . . . [I]t did not reflect a serious expression of intent to inflict harm. This conclusion is supported by the fact that the web site focused primarily on Mrs.

299. 807 A.2d 847 (Pa. 2002). See discussion *supra* Part I.A.2

Fulmer's physique and disposition and utilized cartoon characters, hand drawings, song, and a comparison to Adolph Hitler.³⁰⁰

Courts confronting similar issues in the future are likely to focus on the age of the student (on the premise that older students are presumably more likely to commit and more capable of actually committing acts of violence), the nature of the putative threats, and as noted earlier, the extent to which it is reasonable to conclude that the poster intended for the victim to learn of the threats. The persistence with which a poster continues to put threats online might also be a consideration in this analysis. Overall, though, it is unlikely courts will uphold threat charges based on material posted on a publicly-accessible website. It is even more unlikely that they will uphold threat charges based on a website to which access is restricted.

E. Identity Theft

Cyberbullying can involve what is, in effect, framing the victim, such as using the victim's identity to portray him or her in a bad light.³⁰¹ As the first section below explains, while both state and federal law criminalize a form of identity theft, it is not really the kind of identity theft that serves as an empirical predicate for cyberbullying. The next section analyzes the utility of using identity theft against cyberbullies.

1.The Crime

Every state has criminalized identity theft.³⁰² Congress made it a federal crime in 1998.³⁰³ The federal statute makes it a

300. *J.S.*, 807 A.2d at 859.

301. *See, e.g., A.B. v. State*, 885 N.E.2d 1223, 1224-26 (Ind. 2008) (Students created a MySpace profile for the principal and posted derogatory comments on the fake profile.).

302. *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, IDENTITY THEFT STATUTES & CRIMINAL PENALTIES, Nov. 12, 2007, <http://www.ncsl.org/programs/lis/privacy/idt-statutes.htm> (listing state statutes criminalizing identity theft as of 2007). Some states refer to the crime as

crime to use the “means of identification” of another to commit or to aid and abet the commission of a federal crime or a felony under state law.³⁰⁴ It defines “means of identification” as “any name or number that may be used . . . to identify a specific individual.”³⁰⁵

Most state identity theft statutes make it a crime to assume another person’s identity or use “personal identifying information

“identity fraud” instead of “identity theft.” Substantively, there is little, if any, difference between the crimes. See Samuel H. Johnson, Note, *Who We Really Are: On the Need for the United States to Adopt the European Paradigm for Identity Fraud Protection*, 15 CURRENTS: INT’L TRADE L.J. 123, 123 (2006) (explaining that the difference between terms is a matter of preference). But see KAN. STAT. ANN. § 21-4018 (2007) (distinguishing identity theft and identity fraud). Since our concern is with general prohibitions on using someone else’s identity, we will use the term “identity theft” to denote the crime addressed by all of these statutes.

303. 18 U.S.C. §§ 1028-1028A (2006). See also Joshua R. Levenson, Note, *Strength in Numbers: An Examination into the Liability of Corporate Entities for Consumer and Employee Data Breaches*, 19 U. FLA. J.L. & PUB. POL’Y 95, 111 (2008) (discussing Congress’s enactment of the “Identity Theft and Assumption Deterrence Act”).

304. 18 U.S.C. § 1028(a)(7) (2006). See also N.Y. PENAL LAW § 190.80(3) (McKinney 2009) (defining “identity theft in the first degree” as assuming identity of another and committing or attempting to commit a Class D felony or higher level crime); cf. DEL. CODE ANN. tit. 11, § 854 (2007) (defining identity theft as transmitting another’s personal information in order to commit or facilitate another crime); HAW. REV. STAT. § 708-839.6 (2007) (same); MICH. COMP. LAWS ANN. § 445.67 (West 2009) (same); MINN. STAT. ANN. § 609.527 (West 2009) (same); WASH. REV. CODE ANN. § 9.35.020 (West 2009) (same). See also *United States v. Harrison*, No. 04CR369, 2004 WL 2884310, at *2 (S.D.N.Y. Dec. 10, 2004) (holding defendant guilty of violating 18 U.S.C. § 1028(a)(7) when defendant used other individuals’ identifying information to aid and abet income tax fraud), *aff’d*, 175 F. App’x 386 (2nd Cir. 2006). Section 1028 criminalizes eight different types of conduct, some of which go to creating, transferring, or possessing false identification documents, others of which go to defrauding the U.S. government. Section 1028(a)(7) is the most generic and therefore most commonly used provision. *Id.*

305. 18 U.S.C. § 1028(d)(7). The statute includes someone’s name, social security number, date of birth, driver’s license or identification number, alien registration number, passport number, employer or taxpayer identification number, biometric data such as fingerprints, voice prints, retina or iris images “or other unique physical representation,” or “unique electronic identification number, address, or routing code[,] or telecommunication identifying information or access device[.]” *Id.*

of that other person"³⁰⁶ to "obtain goods, money, property or services or . . . credit in" that person's name.³⁰⁷ Some expansive state statutes follow the federal approach by also making it a crime to use another's personal identifying information to commit or to aid and abet the commission of other crimes.³⁰⁸

306. Definitions of "personal identifying information" in state identity theft statutes essentially track the definition of "means of identification" in the federal statute. *See, e.g.*, MICH. COMP. LAWS ANN. § 750.285 (West 2004) (explaining that definitions of "personal identifying information" in state identity theft statutes essentially track the definition of "means of identification" in the federal statute); *see also* CONN. GEN. STAT. ANN. § 53a-129a(b) (West 2007); DEL. CODE ANN. tit. 11, § 854(c) (2007); MD. CODE ANN., CRIM. LAW § 8-301(a)(1)(3) (LexisNexis 2002); MONT. CODE ANN. § 45-6-332(3) (2007); N.M. STAT. ANN. § 30-16-24.1(C)(2) (West 2003); N.Y. PENAL LAW § 190.77(1) (McKinney 1999); OH. REV. CODE ANN. § 2913.49(A) (LexisNexis 2006); TENN. CODE ANN. § 39-14-150(e) (2006); VT. STAT. ANN. tit. 13, § 2030(c) (2008).

307. N.Y. PENAL LAW § 190.780(1)-(2) (McKinney 1999). *See* ALA. CODE § 13A-8-192(a) (LexisNexis 2005); ARK. CODE ANN. § 5-37-227(a) (2006); COLO. REV. STAT. ANN. § 18-5-902(1) (West 2008); CONN. GEN. STAT. ANN. § 53a-129a(a) (West 2007); D.C. CODE § 22-3227.02 (2001); HAW. REV. STAT. §§ 708-839.7-.8 (1985); 720 ILL. COMP. STAT. ANN. 5/16G-15 (West 2003); IOWA CODE ANN. § 715A.8 (West 2003); KAN. STAT. ANN. § 21-4018(a) (2007); KY. REV. STAT. ANN. § 514.160 (LexisNexis 2008); LA. REV. STAT. ANN. § 14:67.16(B) (2007); MD. CODE ANN., CRIM. LAW § 8-301 (LexisNexis 2002); MASS. ANN. LAWS ch. 266, § 37E (LexisNexis 2002); MISS. CODE ANN. § 97-9-79 (West 2005); MO. ANN. STAT. § 570.223 (West 2009); MONT. CODE ANN. § 45-6-332(1) (2007); N.H. REV. STAT. ANN. § 638:26 (LexisNexis 2007); N.M. STAT. ANN. § 30-16-24.1(c) (West 2003); N.Y. PENAL LAW § 190.78 (McKinney 1999); OHIO REV. CODE ANN. § 2913.49 (LexisNexis 2006); OKLA. STAT. ANN. tit. 21, § 1533.1 (West 2002); OR. REV. STAT. § 165.800 (2007); R.I. GEN. LAWS § 11-49.1-3 (2002); S.C. CODE ANN. § 16-13-510 (2003); S.D. CODIFIED LAWS § 22-40-8 (2006); TENN. CODE ANN. § 39-14-150 (2006); UTAH CODE ANN. § 76-6-1102 (2008); VA. CODE ANN. § 18.2-186.3 (2009); WYO. STAT. ANN. § 6-3-901 (2009).

308. *See* HAW. REV. STAT. § 708-839.6(1) (1985) (explaining that it is a crime to use another's identity to facilitate murder, kidnapping, extortion, criminal property damage, or other crimes); MICH. COMP. LAWS ANN. § 750.285(1)(e) (West 2004) (using another's identity to commit identity theft "or another crime"); 18 PA. CONS. STAT. ANN. § 4120 (West 1983) (crime to use another's identity "to further any unlawful purpose"); VT. STAT. ANN. tit. 13, § 2030 (2008) (using another's identity unlawfully is a crime).

At least two states explicitly make it a crime to use another person's personal identifying information to "harass another person."³⁰⁹ "Harass" seems to have the same meaning as in the free-standing harassment statutes examined earlier.³¹⁰ These provisions presumably make it a crime for A to use B's personal identifying information to harass C.

If these provisions were meant to criminalize the act of using B's identity to harass B, the prohibition should be phrased in terms of "harassing that person" or "harassing the person whose information is being used without authorization." It seems more likely that these statutes are intended to criminalize A's misappropriating B's identity and using it to conceal that it is A – not B – who is harassing C. If that interpretation is correct, these statutes are simply specialized versions of statutes making it a crime to use someone else's identity to commit other crimes.

2. Use Against Cyberbullying

If a cyberbully uses someone else's identity for most of the purposes outlined above, he can be prosecuted for identity theft. Neither the elements of these crimes nor the harms they encompass concern bullying; such conduct therefore becomes irrelevant for the purposes of imposing criminal liability except to the extent that charges for some other offense can be based on the bullying.

Most of the crimes outlined above assume that the person whose identity is misused is the primary victim of the crime; they assume that the identity thief A misappropriates B's identity and uses it fraudulently to obtain goods or services from C or, in the more unusual cases, to commit a crime other than fraud. In this type of identity theft case, B is the primary victim, but there are also secondary victims, C—the businesses the identity thief de-

309. See ARK. CODE ANN. § 5-37-227(b)(2) (2006); MASS. ANN. LAWS ch. 266, § 37E(b)-(c) (LexisNexis 2002).

310. See, e.g., MASS. GEN. LAWS 266 § 37E (2008) (defining "harass" as to "willfully and maliciously engage in an act directed at a . . . person . . . which . . . seriously alarms or annoys such person . . . [and] would cause a reasonable person to suffer substantial emotional distress").

frauded. There is, however, another type of identity theft in which B may share primary victim status with someone else; as noted above, a few states make it a crime for A to use B's identity to harass C.³¹¹

So if cyberbully A misappropriates B's identity and uses it to harass C, A could be prosecuted under one of the identity-theft-for-the-purpose-of-harassment statutes noted above. He might also be susceptible to prosecution under one of the more general statutes making it a crime to use someone's identity to commit another crime if the conduct involved in the bullying constituted the commission of a crime within the scope of the statute. If, for example, cyberbully A used B's identity to threaten someone or extort property from her, then A might be susceptible to prosecution for violating the identity-theft-for-the-purpose-of-committing-specified-crimes if the specified crimes encompassed the relevant offense.³¹² But while either alternative may be a conceptual possibility, both seem rather cumbersome ways to approach cyberbullying, especially in the educational context.

There is another way to approach the cyberbully who uses someone's identity to harass her or to commit other crimes, but it involves a charge that is not generally available under current United States law. Cyberbully A could assume B's identity and use it to engage in activity online that could seriously damage B's reputation and might result in B being prosecuted for crimes. If cyberbully A were to use B's identity to distribute child pornography, B could face criminal charges unless B could show that someone else used her identity to distribute the prohibited material. Or, to use a less extreme example, cyberbully A could use B's identity to make false, defamatory comments about students or teachers at their educational institution. Even if this did not result in B's being prosecuted or sued for defamation, it would no doubt have a profoundly damaging impact on B's reputation and status at the school.

What the cyberbully is really doing in this scenario and similar scenarios is imposture. Cyberbully A is impersonating B without B's consent and for the purpose of harming B in ways that do

311. See *supra* note 309.

312. See *supra* note 308 and accompanying text.

not constitute identity theft as currently defined, or any other crime. The logical response is to charge the cyberbully with criminal impersonation. The problem is that such impersonation is not a crime in the United States.³¹³ Only one state makes it a crime to impersonate someone for the express purpose of damaging his or her reputation.³¹⁴ The distribution of child pornography scenario outlined above might be prosecutable under statutes making it a crime to use someone's identity to commit another crime, but the other scenario seems quite beyond the reach of the criminal law. One way to remedy this is for states to adopt statutes making it a crime for someone to use another person's identity to damage his reputation; in effect, such a statute would be an identity-theft-for-the-purpose-of-committing-defamation statute.³¹⁵

313. A few states have criminal impersonation statutes, but most of them are in effect identity theft statutes. *See, e.g.*, ARIZ. REV. STAT. § 13-2006 (LexisNexis 2001) (showing that a few states have criminal impersonation statutes, but most of them are in effect identity theft statutes); *see also* DEL. CODE ANN. tit. 11, § 907 (2007) (making criminal impersonation a criminal offense); NEB. REV. STAT. § 28-608 (2008) (same).

314. *See* WIS. STAT. ANN. § 943.201(2)(c) (West 2005) (criminalizing the use of someone's personal identifying information to "harm the reputation" of that person). In *State v. Baron*, 754 N.W.2d 175 (Wis. Ct. App. 2008), the Wisconsin Court of Appeals upheld the constitutionality of the statute against a First Amendment challenge. Baron, who forwarded embarrassing e-mails written by his boss to other persons, claimed the statute violated the First Amendment because it "criminalize[d] the act of defaming a public official." *Id.* at 177. The trial court agreed: It found that "because the person whose identity Christopher Baron misappropriated was a public official, application of the identity theft statute violated Baron's First Amendment right to defame a public official with true information." *Id.* at 176-77. The Court of Appeals reversed that decision; it found that the state's identity theft statute "neither prohibited Baron from disseminating information about Fisher nor prevented the public from receiving that information. Instead, the statute prohibited Baron from purporting to be Fisher when he sent the emails." *Id.* at 179. In July of 2008, the Wisconsin Supreme Court chose to hear Baron's appeal from the Court of Appeal's decision. *See State v. Baron*, 769 N.W.2d 34 (Wis. 2009) (holding the statute is unconstitutional; the defendant is free to reveal a public official's bad character, but may not pretend to be the public official).

315. *Baron* may provide useful guidance on the constitutionality of such a statute. *See generally Baron*, 769 N.W.2d 34.

III. KIDDIE CRIME?

One of the characteristics that differentiate what we are calling "kiddie crime" from crime proper is the nature and impact of the harm inflicted by each. Crime is catholic and generic; the harms it encompasses are not limited to a particular segment of society. Thefts victimize rich and poor, individuals and artificial entities alike. The same is true of most other crimes. Some regulatory offenses encompass harm that is necessarily limited to a particular segment of society,³¹⁶ but the harms encompassed by traditional crimes are pervasive and democratic in nature.

Kiddie crime, on the other hand, inflicts harms that are peculiar to a particular context: schools (of whatever type). To the extent that conduct that would otherwise constitute kiddie crime inflicts a generic harm that has been addressed by the criminal law, it can be prosecuted as a crime.³¹⁷ It is, as we have seen, the residual harms that constitute kiddie crime.

The issue we, as a society, need to resolve is whether kiddie crime should be treated as a non-criminal phenomenon or whether the harms it inflicts should become the focus of new, kiddie crime-specific criminal statutes. We *can* create new crimes; the question in this instance is whether we *should* create new crimes that encompass the residual and consequently so-far unaddressed harms constituting kiddie crime.

The answer to that question lies in two aspects of kiddie crime. One is the nature of the harms involved. The other is the fact that kiddie crime is unique to a specific social context.

Modern criminal law addresses two types of harm: "hard harms" and "soft harms."³¹⁸ Hard harms are the bedrock of criminal law. They involve the infliction of tangible, egregious injuries to persons or property and, as such, are the oldest and most persistent harms. The cataloging and proscribing of these harms has been es-

316. See, e.g., 18 U.S.C. § 1348 (2006) (law of securities fraud).

317. See, e.g., *United States v. Morales*, 272 F.3d 284, 285-86 (5th Cir. 2001) (explaining that a student was convicted of violating 18 U.S.C. § 875(c) by threatening to kill fellow students).

318. See *Fantasy Crime*, *supra* note 171.

sentially constant from the Hammurabi's Code through subsequent enactments such as the Salic Law, the common law of Blackstone's era, and the statutes of the present day.³¹⁹ Every society either must outlaw the infliction of a set of core physical harms (such as murder, assault, and rape) on individuals or descend into a state of chaos in which the strong exploit the weak.³²⁰ Every society must also outlaw a collateral set of physical harms (such as adultery, incest, and child abuse) the infliction of which can erode its ability to maintain internal order. Since property is valued almost as highly as human life, each society will also outlaw the infliction of a set of core physical harms to property (such as arson and other types of damage, theft, and robbery). More evolved societies will also proscribe the infliction of a collateral set of derivative harms (such as fraud, counterfeiting, vandalism, and forgery).

In modern societies, especially the United States, we see the extrapolation of many of the core and collateral hard harms into an almost dizzying array of "crimes" of varying types and degrees of severity.³²¹ The extrapolation is attributable to two factors. One is the refinement of penal philosophies, which have moved beyond the *lex talionis* (the law of retaliation) and a default reliance on death as the punishment for criminal conduct; modern penal philosophies and modern criminal law focus on the nuances of the

319. See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512-13 (2001) (showing the consistent condemnation of hard harms throughout different eras). Compare THE AVALON PROJECT, THE CODE OF HAMMURABI (L.W. King, trans.), http://avalon.law.yale.edu/subject_menus/hammenu.asp, and THE AVALON PROJECT, THE SALIC LAW, <http://avalon.law.yale.edu/medieval/salic.asp>, with BLACKSTONE, *supra* Note 219, *127-250 (detailing offenses against public justice, public peace, public trade, public health, individuals, the home, and private property), and MODEL PENAL CODE §§ 210-251.4 (Proposed Official Draft 1962) (detailing crimes against people, property, the family, public administration, and public order and decency).

320. See Susan W. Brenner, *Toward a Criminal Law for Cyberspace*, 10 B.U. J. SCI. & TECH. L. 1, 6-45 (2004) (arguing for the criminalization of harms).

321. See Stuntz, *supra* note 319, at 513-51. See also Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law*, 1998 A.B.A. SEC. CRIM. JUSTICE REP. 9-10 n.11.

harm inflicted and the personal characteristics of the offender in an attempt to impose a sanction that is idiosyncratic enough to constitute fair, but not unjust, punishment.³²² The other factor is the politicization of crime; the use of the penal sanction has been expanded broadly, most notably in the area of regulatory offenses.³²³ While the criminal law of ages past was concerned primarily, if not exclusively, with retribution,³²⁴ our criminal law is increasingly intended to regulate conduct in a variety of areas, most of which have little or nothing to do with inflicting the core or collateral harms outlined above.³²⁵ This brings us to the other category of "harm."

Unlike hard harms, which involve tangible injury to persons or property, soft harms are more difficult to define. Essentially, they involve the infliction of some type of injury to morality affectivity, or a systemic concern with the safety of individuals and the integrity of property.³²⁶ Except for non-reputational-injury identity theft, the crimes we examined above are all soft harm crimes that target injury to affectivity.³²⁷ Kiddie crime encompasses the residuum of affective harms that have not already been criminalized, probably for good reason.

Criminalizing the infliction of affective harm is a dicey undertaking. As we saw earlier, in criminalizing the infliction of some soft harms, legislators worked to include elements that would pre-

322. See Kyron Huigens, *What Is and Is Not Pathological in Criminal Law*, 101 MICH. L. REV. 811, 817-19 (2002); see also Robert M. A. Johnson, *Is It A Crime?*, 21 CRIM. JUST. 1 (2006) (discussing the relevance of expanding criminal law).

323. See Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 972-75 (2007).

324. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 819 (1991) (holding that the effects of a murder on the victim's family may be used as admissible evidence against the defendant at a capital punishment hearing).

325. See, e.g., Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747 (2005) (discussing the move toward over-regulation in our society); see also William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1893-94 (2000) (discussing legislative crime definition).

326. See *Fantasy Crime*, *supra* note 171, at 6-12 (explaining soft and hard harms).

327. See *supra* Part II.

vent the statutes from being held void for vagueness and from predicated criminal liability on the subjective vagaries of potential victims.³²⁸ While we cannot say that the criminalization of soft harms has gone as far as it can without violating constitutional principles, we believe it is wise to be cautious in expanding the use of the criminal sanction to deter the infliction of soft harms.

To create new crimes that target the so-far unaddressed soft harms that constitute kiddie crime, we would have to move much further into the territory of affective harms. To address the residual harm that cannot be prosecuted as stalking or harassment, we would have to predicate liability on a subset of the conduct criminalized by these statutes. We could therefore make it a (new) crime to commit a single act that caused the victim to suffer emotional distress; if we wanted to set the liability bar a little higher but still achieve essentially the same result, we could make it a crime (another new crime) (i) to engage in a course of conduct that caused the victim to suffer emotional distress, or (ii) to commit a single act that caused the victim to suffer substantial emotional distress. We might, in addition or instead, reduce the level of mens rea from purpose or intention to knowing or even to reckless conduct.

We could do this with stalking and harassment, and could probably do something similar with other relevant soft harm crimes (such as threats or invasion of privacy).³²⁹ We should not do it because lowering the bar further for the imposition of criminal liability on those who inflict soft harm is a very bad idea, even if we ignore the vagueness and other legal challenges that could be brought to the scaled-down offenses. It would trivialize the import and significance of the criminal law; the parsimonious use of criminal sanctions to discourage the infliction of egregious affective harm is a necessary step in a world in which soft harms assume a greater importance than in the past.

As we have seen, modern technology lets people hurt each other in new ways—ways that can have a lasting impact on the vic-

328. *See supra* Part II.

329. The First Amendment issues that arise with criminal defamation would probably preclude us from lowering the mens rea and other requirements for imposing liability. *See supra* Part II.B.

tim.³³⁰ The use of criminal liability is appropriate when the harm inflicted is so severe that it is at least arguably commensurate with the harms criminal law has always addressed. It is not appropriate when the severity of the affective harm inflicted does not rise to that level.

We cannot criminalize every instance in which people hurt each other's feelings; hurting other people's feelings, intentionally and inadvertently, is an unpleasant but unavoidable aspect of life. There are some things that are not, and should not become, crimes. As the drafters of the Restatement of Torts noted, law cannot take cognizance of

insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and . . . [we] must . . . be hardened to . . . acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.³³¹

This is particularly true for cyberbullying because it takes place in a specific context and involves a more or less immature population that can be expected to have more rough edges than the general, primarily adult, population.

We believe kiddie crime is most appropriately addressed within the context from which it emerges—within the school the victim and perpetrator(s) attend. Having schools address kiddie crime is appropriate for several reasons. One, as we have seen, is

330. See, e.g., Lisa Sink & Linda Spice, *Man Charged with Defamation: Disgruntled Fired Employee Accused of Posting Ad with Ex-boss' Name on Internet*, MILWAUKEE J. SENTINEL, June 7, 2000, at B1 (claiming that "[p]eople's reputations are sullied in a very new way, and it's very hard for them to recover from that").

331. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

that it is inappropriate to extend criminal liability to the very real but lesser levels of soft harm kiddie crime inflicts on its victims. Another reason is that addressing kiddie crime seems to fall within schools' educational mission; schools are, after all, responsible for filing down the rough edges of the students who are in their charge. Finally, educational institutions are also victims of kiddie crime; as we saw in Part II, schools are concerned about cyberbullying because it can have a detrimental effect on their ability to carry out their educational mission.

When the soft harms inflicted by a cyberbully rise to the level of stalking, harassment, or the other crimes we examined in this article, the bully can be prosecuted and sanctioned by the criminal justice system. This is appropriate because the harms the cyberbully inflicted are of a severity justifying the imposition of criminal liability; they transcend the context-specific harm involved in kiddie crime. If the soft harms inflicted by a cyberbully do not rise to this level, they fall into the residual category of kiddie crime; since the context-specific harms constituting kiddie crime are the product of the educational context and impact on that context, they should be addressed there.

Schools can deal more quickly and easily with "soft" harms caused by cyberbullying—detentions, suspensions, and expulsions can be meted out and finalized before a single complaint and answer could be filed. Further, those disciplinary procedures assure that the students can stay *in* school and continue the process of "filing down the edges." As we have explained, most of these cases stem from students simply "typing before they think"—many of the cases outlined in Part II involved students with respectable grades and no previous discipline records. Criminalizing this behavior would unnecessarily punish students who are still in the throes of learning about appropriate behavior, online and off.

Additionally, schools can modify their codes of conduct easily to cover cyberbullying issues, giving themselves jurisdiction over any issues that may arise. While the schools still need to show a material disruption under the *Tinker*³³² standard, some argue that a

332. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (explaining that the standard allows a school to interfere with free speech of

victim being forced to attend school with his cyberbully and then go home to find more teasing online would be enough of a disruption for that particular student to rise to this standard.

Finally, if the individual students feel the harms rise to the level of necessitating some intervention in the legal system, he can always fall back on the gap-filler tort of intentional infliction of emotional distress and take his antagonist to court.

students only when there is substantial interference with the function of the school).